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No. _____

In The

Supreme Court of the United States

October Term, 1993

CHARLES E. PRENTICE and JANE G. PRENTICE, husband and wife, on behalf of themselves and all others similarly situated,

Petitioners,

v.

TITLE INSURANCE COMPANY OF MINNESOTA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Wisconsin

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the antitrust damage rule of *Keogh v. Chicago and N. W. Railway Co.*, 260 U.S. 156 (1922), should bar the money damages provided by statute as the remedy for a consumer class action State antitrust law price-fixing claim, because the claim is made against insurance companies and their employees that are subject to a scheme of state insurance regulation that includes an after-the-fact rate filing requirement, when:

(a) State law provides that rates may be changed at any time without a prior or contemporaneous tariff filing reflecting such change;

(b) State law provides that competition, rather than State intervention sufficiently active to warrant state action immunity, is to be relied upon to regulate rates;

(c) State law provides that remedies within the unsupervised State regulatory scheme are prospective only; and

(d) the same issue was resolved adversely as to some of the defendants by a federal court of appeals?

PARTIES IN THE PROCEEDING

This petition is filed by two individuals, Charles E. and Jane G. Prentice, husband and wife, who were named as plaintiffs and representatives of a putative class in the complaint filed in this case, and were appellants in the Wisconsin Supreme Court.

The respondents are corporations and individuals who were named as defendants in the complaint and who were appellees (i.e., respondents) in the Wisconsin Supreme Court. The names of all respondents are set forth in the caption to the decision of the Wisconsin Supreme Court in this action, App. 1-2, and in the complaint. App. 52-54.

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On Petition For Writ Of Certiorari To The Supreme Court Of Wisconsin

PETITION FOR WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the Wisconsin Supreme Court in Charles E. Prentice and Jane G. Prentice, *et al.* v. Title Insurance Company of Minnesota, *et al.*, Nos. 91-0402 and 91-1580, entered on June 9, 1993. Petitioners seek review of the Wisconsin Supreme Court's incorrect application of federal law, as set forth in *Keogh v. Chicago and N.W. Railway Co.*, 260 U.S. 156 (1922), to bar a treble-damage remedy under Wisconsin law for price fixing previously determined by this Court in *FTC v. Ticor*

Title Ins. Co., 112 S. Ct. 2169 (1992), to be the product of private agreement rather than active State intervention.

OPINIONS BELOW

The opinion of the Wisconsin Supreme Court is reported at 176 Wis. 2d 714, 500 N.W. 2d 658 (1993), and is reprinted in the Appendix at App. 1. The unreported decision below of the Milwaukee County Circuit Court, dated October 17, 1990, is reprinted in the Appendix at App. 71.

JURISDICTION

The judgment of the Wisconsin Supreme Court was entered when plaintiffs' timely filed motion for reconsideration was denied on September 9, 1993. App. 45. This Court has jurisdiction to review the judgment of the Wisconsin Supreme Court under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The decision of the Wisconsin Supreme Court was based on the Supremacy Clause of Article VI of the United States Constitution, which states that the "Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land. . . . "

STATEMENT OF THE CASE

This petition[1] seeks review of the Wisconsin Supreme Court's decision affirming the dismissal of this class action brought under the Wisconsin antitrust law. The court, in a divided opinion, held that the federal *Keogh* antitrust damage rule was controlling to obviate plaintiffs' claim for money damages measured by the overcharges resulting from the defendants' unlawful, 15-year price-fixing conspiracy in Wisconsin on title insurance and related services. The proceedings below are best understood in light of related litigation.

The FTC Proceedings. This case is an outgrowth of a multi-state federal antitrust investigation by the Federal Trade Commission ("FTC") of whether numerous title insurance industry rate bureaus were engaged in unimmunized price fixing. The investigation resulted in an FTC adjudication of price fixing in violation of section 5 of the FTC Act, 15 U.S.C. § 45, in several states, including Wisconsin, by five of the largest national title insurance companies. *In re Ticor Title Ins. Co.*, 112 F.T.C. 344 (1989). Last year this Court affirmed the FTC's finding that the conduct of the respondents in that case, as to Wisconsin, lacked sufficient state intervention into the regulation of rates to justify a grant of state action immunity. *FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 2169 (1992).

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[1] Petitioners' counsel wish to express their appreciation to Paul Olszowska, a second-year student at the University of Wisconsin Law School, for his research assistance on this petition.

MDL 633. Early in the course of the FTC investigation, numerous private treble-damages class actions relating to title search and examination services were brought under section 1 of the Sherman Act; these were consolidated in the Eastern District of Pennsylvania in a proceeding known as *In re Real Estate Title and Settlement Services Antitrust Litigation*, MDL No. 633. Unlike this case, which has alleged a Wisconsin-specific 15-year price fixing conspiracy involving many defendants in addition to the FTC respondents, MDL 633 involved no Wisconsin resident named plaintiffs, no pleaded Wisconsin law claims and no price fixing on title insurance. Instead, MDL 633 charged only a four-year,[2] multi-state conspiracy to fix fees for title search and examination services among the five respondents in the FTC investigation. MDL 633 was settled in June 1986, long before the FTC decision, and without any award of money damages to the class. MDL 633, 1986-1 Trade Cases (CCH) ¶ 67,149 (E.D. Pa. 1986), *aff'd without opinion*, 815 F.2d 695 (3d Cir. 1987), *cert. denied*, 485 U.S. 909 (1988).

Brown. In April 1990, a Sherman Act antitrust class action mirroring MDL 633 was brought on behalf of Arizona and Wisconsin consumers of title search and examination services in the federal district court in Phoenix, Arizona. The defendants were essentially the same as in *FTC v. Ticor* and MDL 633, and the putative class

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[2] In this case, plaintiffs' claim of a longer conspiracy was grounded in Wisconsin antitrust law, which plaintiffs claimed provided a longer limitation period than the four years available under federal law.

embraces purchasers of title search and examination services during 1981-84. The district court dismissed *Brown* on *res judicata* and state action grounds prior to this Court's ruling in *FTC v. Ticor*. The decision was reversed by the Ninth Circuit following *FTC v. Ticor*; the court also rejected respondents' argument that the district court should be affirmed under the filed tariff doctrine. *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992). Following a petition for a writ of *certiorari* encompassing essentially all three issues decided in *Brown*, this Court recently granted *certiorari* limited to the *res judicata* issue. No. 92-1988, 114 S. Ct. 56 (Oct. 4, 1993).

Prentice. This antitrust class action lawsuit was filed in August 1989 in the Milwaukee County Circuit Court, seeking treble damages under the Wisconsin antitrust laws against all twelve title insurance companies authorized to do business in Wisconsin and certain of their employees. The named plaintiffs, the Prentices, represent a putative class of just Wisconsin citizens who purchased title insurance from the defendants between the years 1971-86. The complaint, App. 52, alleges price fixing on title insurance premiums as well as price fixing on title insurance and examination services (to which *FTC v. Ticor*, MDL 633 and *Brown* were limited).

The defendants moved the MDL 633 district court to enjoin the action. Plaintiffs opposed the motion, which was denied in an unreported opinion of Van Artsdalen, J., E.D. Pa. No appeal was taken. Defendants thereafter moved in the Milwaukee trial court to dismiss the complaint on *res judicata*, filed tariff doctrine, statute of limitations and implied exemption (from Wisconsin antitrust law) grounds. Following oral argument, the court, the

Hon. John E. McCormick presiding, granted the motion on *res judicata*[3] and filed tariff doctrine grounds. App. 71. On appeal, the Wisconsin Court of Appeals certified the case directly to the Wisconsin Supreme Court, which accepted it for review. Following supplemental briefing on the intervening decision of this Court in *FTC v. Ticor*, oral argument on the appeal was heard on February 1, 1993. The court issued its decision on June 9, 1993. App. 1.

The Decision Below. The decision of the Wisconsin Supreme Court affirmed the judgment of the trial court, relying exclusively on the filed tariff doctrine arguments advanced by defendants-respondents. App. 5. Justices Steinmetz and Ceci did not participate in the decision, App. 13; Justice Abrahamson dissented. App. 14. The court did not address the *res judicata* or implied exemption arguments, App. 5, although they were extensively briefed and argued. Plaintiff-appellants contended, as they had in the trial court, that the Sherman Act rule precluding damages for price fixing measured as an assertedly unlawful departure from filed ICC rates, as announced by this Court in *Keogh v. Chicago and N.W. Railway Co.*, 260 U.S. 156 (1922), did not apply to this case, App. 8, and that in any event the Wisconsin state courts were not compelled to follow such federal precedent. App. 35. The court disagreed, observing that its decisions

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[3] Because this case, unlike *Brown*, is based on state law claims never pleaded in MDL 633, the *res judicata* issue in this case differs materially from that currently before the Court in *Brown*.

on the reach of the Wisconsin antitrust law are "controlled by federal decisions under the Sherman Act." App. 8. The court continued:

> The United States Supreme Court recently examined and expressly reaffirmed the holding in *Keogh*. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986). This court's policy of conforming our antitrust decisions to those of the United States Supreme Court, coupled with this court's history of consistently applying the filed rate doctrine, leads us to adopt the reasoning of the United States Supreme Court's decision in *Keogh*.

App. 8.[4]

Following the decision, plaintiffs-appellants filed a timely motion for reconsideration, App. 16, which was opposed by defendants-respondents. App. 30. Among other arguments, plaintiffs-appellants claimed that the *Brown* decision, which had been denied rehearing by the Ninth Circuit between the time of oral argument and the court's decision, was directly conflicting and binding on the federal law issue resolved by the Wisconsin Supreme Court. App. 18-23. The court denied the motion for reconsideration without opinion on September 9, 1993, App. 45, and entered judgment against plaintiffs-appellants.

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[4] The court's reference to its earlier filed tariff decisions was to Wisconsin cases that applied this Court's general filed tariff doctrine, App. 5-6, but did not involve the *Keogh* antitrust rule. App. 7 ("this case presents the first opportunity for this court to follow the rule announced in *Keogh*, and apply the filed rate doctrine to an antitrust claim . . . . ").

Petitioners now seek review in this Court of the Wisconsin Supreme Court's affirmance of the dismissal of their case for the reasons hereinafter stated.

REASONS FOR GRANTING THE PETITION

Introduction and Summary

The discretionary basis for this petition is twofold: the Wisconsin Supreme Court, in a divided opinion, has decided an important federal question (1) in a way that conflicts with a decision of the Ninth Circuit, Supreme Court Rule 10.1(b); and (2) which has not been, but should be, settled by this Court. Rule 10.1(c). The federal question is the extent to which the rule of *Keogh v. Chicago and N.W. Railway Co.*, 260 U.S. 156 (1922), which denies an antitrust damage remedy to shippers that pay price-fixed rates, should be deemed applicable outside the regulatory context in which it arose – tariff-based regulation of surface carrier rates by the Interstate Commerce Commission ("ICC") under the Interstate Commerce Act ("ICA").

In the seven decades since *Keogh*, the lower courts have not developed consistent and workable standards for deciding outside the ICA context what nature and quality of regulatory involvement in rates justifies a judicial override of the antitrust law's vital treble-damage remedy for price fixing. This Court has not had an occasion to resolve this difficult problem, and the case law has, predictably, varied widely in outcome and analysis,

discerning varying bases for *Keogh* and differing assessments of their continuing vitality in this era of far different understanding about the relationship between competition and regulation.

The evolution of our market-based economy in the interim, however, only underscores the importance of fresh guidance from this Court on the role for private treble damage actions in situations where cartelized rates are subject to far less regulatory scrutiny than was typical in regulatory environments seventy years ago. Then, ICA-type regulation was the paradigm; today such pervasive governmental intervention is the exception. The evolution in the regulation of insurance rates in Wisconsin, the basis on which the *Keogh* question is presented here, amply illustrates this phenomenon, and provides this Court precisely the kind of competition-based regulatory scheme where a definitive ruling that *Keogh* has no place is warranted. That outcome is critical to the regulatory goal of reasonable rates set by competitive market forces not just in Wisconsin, but in every federal and state regulatory regime using competition, backed by latent statutory power to intervene, to determine rates.

The Ninth Circuit correctly understood and applied these principles to hold many of the respondents in this case accountable in antitrust damages for their price-fixing on services related to title insurance in Wisconsin – the precise conduct this Court ruled last year in *FTC v. Ticor Title Ins. Co.*, 112 S. Ct. 2169 (1992), enjoyed no state action immunity. *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 393-94 (9th Cir. 1992). In this consumer class action, in a decision subsequent to *Brown*, the Wisconsin Supreme Court ignored *Brown* and, in flatly contrary reasoning and

result, extended *Keogh* so far that the victims of respondents' price fixing are denied meaningful redress under both the antitrust laws and the regulatory regime. This Court should resolve this important conflict and establish guidelines that do not unduly curtail traditional antitrust remedies for price-fixing in the context of competition-based regulation.

1. Developments Since *Keogh* Warrant Not Expanding the *Keogh* Rule Beyond the Statutory Context in Which it Arose

The *Keogh* rule, first announced in *Keogh v. Chicago and N.W. Railway Co.*, 260 U.S. 156 (1922), is a specialized limitation on the availability of a treble-damage remedy under the antitrust laws:

> Keogh simply held that an award of treble damages is not an available remedy for a private shipper claiming that the rate submitted to, and approved by, the ICC was the product of an antitrust violation.

Square D Co. v. Niagara Frontier Tariff Bureau, Inc., 476 U.S. 409, 422 (1986). Underlying the *Keogh* rule is the "legal rights" concept that is the hallmark of the filed tariff doctrine:

> The [*Keogh*] Court reasoned that the ICC's approval had, in effect, established the lawfulness of the defendant's rates, and that the legal right of the shippers against the carrier had to be measured by the published tariff.

Id. at 416 (footnote omitted). *Accord, Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 120 (1990).

Keogh held that this consequence of the regulatory process had a direct impact on the reach of the treble-damage provisions of the federal antitrust laws:

> [The *Keogh* Court] therefore concluded that the shipper could not have been "injured in his business or property" within the meaning of § 7 of the Sherman Act by paying the carrier the rate that had been approved by the ICC.

476 U.S. at 416.[5] In short, *Keogh* is not a broad-based antitrust immunity rule, *id.* at 422, but rather a narrow and specific harmonization of two federal statutes – the Sherman Act and the Interstate Commerce Act ("ICA") – grounded in the antecedent filed tariff doctrine.

Following *Keogh*, this Court has had many occasions to review both the more general filed tariff doctrine and the broader question of antitrust immunity in regulated industries, but the *Keogh* rule itself stood unreexamined by this Court for over six decades. It was finally reconsidered in *Square D*, in the same context as *Keogh* – tariff regulation under the ICA by the ICC. The briefs in that case are informative in interpreting the outcome. Petitioners, drawing support from the Second Circuit's "thoughtful and incisive opinion," 476 U.S. at 423, questioning the continued viability of *Keogh*, and further supported by the amicus brief of the Solicitor General, urged that *Keogh* be overruled. Respondents presented arguments grounded primarily in *stare decisis* and the claim that only Congress

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[5] The quoted Sherman Act provision is now found in § 4 of the Clayton Act, 15 U.S.C. § 15(a).

should overrule *Keogh*.[6] The Court found respondents' prudential arguments so compelling that it was unwilling to disturb *Keogh* despite "assum[ing] that petitioners are correct in arguing that the Keogh decision was unwise as a matter of policy. . . . " *Id.* at 420.[7]

Judge Friendly's *Square D* opinion makes a powerful case against *Keogh* even while acknowledging its continued role in ICA regulation. His arguments make clear, however, that *Keogh* should not be expanded beyond that regime, given this vastly different era that has seen the wholesale replacement of detailed, prior approval, cost-of-service economic regulation with a variety of competition-oriented regulatory schemes. *See Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1352-55 (2d Cir. 1985). As this Court observed last year in a case scrutinizing precisely the regulatory scheme involved here,

> the States regulate their economies in many ways not inconsistent with the antitrust laws . . . . By adhering in most cases to fundamental

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[6] To the extent the *Square D* respondents addressed the merits of the *Keogh* rule, their arguments were focused on the prospect for judicial interference with ICA regulation, described as "a congressionally mandated scheme of rate regulation unparalleled in its pervasiveness." No. 85-21, Brief for the Respondents 18.

[7] Since *Square D*, the limited nature of the Court's endorsement of *Keogh* has not always been appreciated, as the lower court decision in this case attests, App. 8, but other courts have recognized *Square D* for the grudging reaffirmation that it is. *E.g., A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1405 (7th Cir. 1989) (Easterbrook, J.) ("living on borrowed time"), *cert. denied*, 494 U.S. 1019 (1990).

> and accepted assumptions about the benefits of competition within the framework of the antitrust laws, we increase the States' regulatory flexibility.

FTC v. Ticor Title Ins. Co., 112 S. Ct. 2169, 2178 (1992).

Thus, while *Square D* may have definitively settled the continuing vitality of *Keogh* in connection with ICC-filed rates absent action by Congress, it did nothing to suggest that this Court would extend *Keogh* today beyond the narrow ICA context in which it arose.[8] Indeed, considering the "powerful role of the private treble-damages action in the structure of the Nation's antitrust laws," *Square D*, 476 U.S. at 422 n.28, the idea of extending *Keogh* is roughly equivalent to the proposition that the judicially created antitrust exemption for major league baseball should be extended to other professional sports. Thus, this Court would be justified in concluding that the many developments in the evolution of regulatory, antitrust, remedial and procedural law since 1922 do not warrant expanding *Keogh* beyond the ICC, just as the now antiquated thinking that same year in *Federal Baseball Club v. National League*, 259 U.S. 200 (1922), has long been limited to baseball. *Radovich v. National Football League*, 352 U.S.

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[8] Lower courts, of course, are reluctant to significantly limit Supreme Court decisions on their own. *See, e.g., A. A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., supra*, 881 F.2d at 1405 ("It is presumptuous – more, it produces uncertain and unequal application of the law – for an inferior court to act on a belief that a given decision will be among the handful that the Supreme Court overrules or significantly limits.").

445, 450-52 (1957); *Flood v. Kuhn*, 407 U.S. 258, 282-83 (1972).[9]

2. It is Important for this Court to Address the Circumstances Under Which the Nature and Quality of Modern, Competition-Based Regulation Should Preclude an Antitrust Damages Remedy to Victims of Price Fixing on Rates Within Such Regimes

This case would not require the Court to decide whether to confine *Keogh* to rate regulation under the ICA, even though that may be its proper fate. Rather, this case squarely presents a set of facts and circumstances from which this Court can fashion workable standards for what nature or quality of rate regulation implicates the *Keogh* rule in non-ICA regulatory contexts. This issue has been unresolved ever since *Keogh* was decided. It increased in importance when *Square D* made clear that *Keogh* was not implicitly overruled by *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966), which rejected the shipping industry claim that because its ratemaking activities were subject to regulation they were immunized from antitrust scrutiny. 476 U.S. at 420-22. In *Square D* the Court noted that *Carnation* did not implicate the "specific Keogh holding . . . because the ratemaking agreements challenged in that case had not been

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[9] Petitioners take no credit for the analogy between the *Keogh* rule and baseball's antitrust exemption. That belongs to the respondents in *Square D*, who repeatedly cited *Flood v. Kuhn* in their prudential argument for leaving *Keogh* undisturbed. In No. 85-21, *see* Respondents' Joint Brief in Opposition 11; Brief for the Respondents 45; *see also* Amicus Brief of the Ass'n of American Railroads 21.

approved by, or filed with, the Federal Maritime Commission." *Id.* at 422 n.29. *Square D* therefore casts a large shadow of doubt over any uncritical lower court extension of *Keogh* to schemes of regulation that, unlike the ICA, provide no "mandate to regulate *rate* competition" and are "designed to minimize the role of the [regulatory agency] in this regard." *Id.* (emphasis in original).

Of the several arguments advanced by Justice Brandeis in *Keogh* for the Court's decision, only two appear to have retained any modern currency outside the ICA context. Both relate to the prospect for judicial interposition of an antitrust damage remedy into schemes of active regulatory rate-setting, and can usefully be denoted "[t]he anti-discrimination strand and the non-justiciability strand" of the underlying filed tariff doctrine. *Wegoland, Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112, 1115 (S.D.N.Y. 1992). The anti-discrimination strand is grounded in concern that judicial relief permits the plaintiff to subvert the regulatory goal of uniform rates by effectively paying a lower rate than other ratepayers; the non-justiciability strand is grounded in concern that a judicial assessment of damages would require the court to adjudicate what constitutes a reasonable rate, a process more appropriate for (and required of) the regulator. *See id.* at 1113-15.

As discussed briefly below, the nature and quality of the regulation involved in this case do not raise either of these *Keogh* "core principles." *Gelb v. American Tel. & Tel. Co.*, 813 F. Supp. 1022, 1027 (S.D.N.Y. 1993). Wisconsin relies on competition in the marketplace, not regulatory scrutiny of pre-filed rates, to set reasonable insurance

rates, which do not even have to be filed with the regulatory agency before being used. Wisconsin's decision to abandon outmoded forms of direct, affirmative regulatory intervention into insurance industry pricing was premised on its belief that competition can be relied upon to set the standard for reasonable rates. Deregulation of this sort is by no means limited to Wisconsin or insurance; it is pervasive at both the federal and state level and even extends, to some extent, to industries once thought to be natural monopolies that would always be pervasively regulated, such as telecommunications, oil and gas pipelines and electric utilities. Thus, it is important for this Court to address the circumstances under which the nature and quality of modern regulatory environments that use competition as an ally to regulate an industry still preclude victims of illegal anticompetitive conduct within that industry from availing themselves of an antitrust damage remedy – "a chief tool in the antitrust enforcement scheme, posing a crucial deterrent to potential violators." *Square D*, 476 U.S. at 422 n.28.

3. The Wisconsin Scheme of Insurance Regulation Does Not Implicate *Keogh* Concerns

The Wisconsin scheme of insurance regulation is the polar opposite of tariff-based ICC regulation, ancient or modern, and therefore presents for this Court a solid basis for a ruling that *Keogh* has no place in a regulatory scheme that relies primarily on marketplace forces. The Wisconsin insurance code makes independent rate decisions by insurers and the resulting competition the cornerstone of insurance rate regulation. Latent and very limited regulatory provisions come into play only "if

independent action and price competition fail." Sec. 625.01(2) (c), Wis. Stats. The Wisconsin legislature revised the Wisconsin insurance code in 1969 as "the result of a long and careful study of rate regulation," which found that the earlier system of prior approval "rate regulation has been rendered unnecessary through the development of a strikingly greater degree of meaningful price competition in many of the most important lines of insurance." Committee Comment, Wis. Stat. Ann., Ch. 625 at 2 (West 1980). The Wisconsin legislature assessed changes in industry attitudes and practices, as well as numerous defects in "[r]ate regulation in the traditional manner." *Id.* at 3.

A key feature of the revised code was enactment of "a system of rate control which eliminates the requirement that rates be reviewed by the commissioner before use." *Id.* Under the new system, "*insurers can use the rates they choose. No approval is required, and a filing is required only for information and after the fact.*" *Id.* at 4 (emphasis added).[10] The "prior approval system" was rejected

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[10] In contrast, Congress' ICA relaxation of the prior approval process for tariffs filed at the ICC before the *Square D* decision did not eliminate the requirement to file such tariffs *before* they are used. As noted in *Square D*, "the ICC requires motor carriers to file tariffs containing all their rates, to make the tariffs available for public inspection, and to give *advance notice* of any changes in the filed rates." 476 U.S. at 413 (emphasis added). Even in the ICA context, railroad amicus in *Square D* conceded that, for some rail traffic, ICA tariff filing requirements were either eliminated or subject to such limited disapproval authority that such traffic had lost *Keogh* protection. No. 85-21, Amicus Brief of Ass'n of American Railroads 25-27. *See also* Amicus Brief of Western Fuels Ass'n, Inc. 10 (discussing 49 U.S.C. § 10713).

because experience had shown "that it is impossible to decide on the 'right' or 'proper' premium." *Id.* at 5. Instead, higher or lower rates may be adopted at any time; an insurer's only tariff obligation is to file the new rates with the Office of the Commissioner of Insurance ("OCI") within 30 days of initial use. Sec. 625.13 (1), Wis. Stats.[11]

Similarly, in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc., supra,* the Court adhered to the filed tariff doctrine, despite substantial competing equitable arguments, on the grounds that it "follows from the requirement that only filed rates be collected as commanded by [the ICA]." 497 U.S. at 128; *id.* at 131 (the ICA "*requires* the carrier to collect the filed rate . . . . ") (emphasis in original).

[11] In *FTC v. Ticor,* this Court described the process of title insurance regulation in four states, including Wisconsin, drawn from the findings of the FTC Administrative Law Judge ("ALJ") who presided over the case. The States were described as employing a "negative option" system to approve rate filings, wherein rates that are filed "became effective unless the State rejected them within a specified period, such as 30 days." 112 S. Ct. at 2174. This generic description does not fit Wisconsin's "use and file" system, Wis. Stats. § 625.13(1), as expressly found by the ALJ in Finding of Fact No. 138. No. 91-72, Pet. App. 197a.

The Court also noted that the FTC had conceded the first part of the state action test, articulation of "a clear and affirmative policy to allow the anticompetitive conduct." 112 S. Ct. at 2175. Such a concession, as an expedient in litigation involving a multiplicity of state regulatory schemes, cannot change the fact that "[t]he 'use and file' approach of Wisconsin reflects a state policy of not interfering with private rate setting on the assumption that market competition would largely determine rates." ALJ Finding of Fact No. 139. No. 91-72, Pet. App. 197a. In the *Ticor* amicus brief for 36 States, the Attorney General of the State of Wisconsin effectively confirmed this finding, describing the Wisconsin regulatory scheme in detail, to explain why Wisconsin relies "on competition, rather than regulation, to set rates. . . . " No. 91-72, Attys. Gen. Amicus Br. 18.

In short, the Wisconsin scheme of insurance regulation closely mirrors the evolutionary developments in competition-based regulation cited by Judge Friendly in *Square D* as "particularly strong" reasons not to extend *Keogh*. 760 F.2d at 1354. Indeed, if *Keogh* is left in place to block an antitrust damages remedy in this case, the million or so Wisconsin ratepayers and price-fixing victims to be represented in this class action will be without a remedy of any direct benefit to them.[12] As Wisconsin Supreme Court Justice Abrahamson noted in uncontradicted dissent in this case, ratepayer remedies under the Wisconsin insurance law "are prospective only. Secs. 625.11, 625.22 Stats. 1991-92." App. 15.

4. Review of This Case Would Clarify the Circumstances Under Which a Damages Remedy for Various Statutory Violations Would Interfere With Regulatory Oversight of Rates

Review in this case would also permit the Court to look beyond one Wisconsin regulatory scheme to provide important *Keogh*-type guidance for other regulatory regimes as well. The lower courts have struggled to develop a coherent rationale for when a non-ICC regulatory

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Of course, neither of these points concerning reduced State intervention has any significance to the outcome of *FTC v. Ticor* as to Wisconsin, except to reinforce the correctness of the result.

[12] The lower court noted the availability of injunctive relief, App. 11, but considering that the average title insurance purchaser typically purchases title insurance only a handful of times in a lifetime, and not in any regular or periodic way, there is no practical distinction to the consumer between denial of a damage remedy and denial of all remedies.

scheme shields a rate from damage claims under antitrust, securities and RICO laws, with varying results, of which *Wegoland, Ltd. v. NYNEX Corp., supra,* 806 F. Supp. 1112, and *Gelb v. American Tel. & Tel. Co., supra,* 813 F. Supp. 1022, are only among the most recent of many intensely litigated examples.[13]

Upon plenary consideration, petitioners will readily demonstrate that this antitrust case is an archetype for *Keogh* purposes. It involves a system of regulation where rates can be changed at any time without any prior or contemporaneous tariff filings or other regulatory supervision, and a class action challenge to price-fixed rates which were exclusively the product of an illegal private agreement. It implicates neither the non-justiciability nor the anti-discrimination strand underlying *Keogh*. When, as here, Wisconsin regulators have relied entirely on competition to set rates and have done nothing more with tariff filings than tuck them away in a regulatory shoe box, *see FTC v. Ticor,* 112 S. Ct. at 2175, the traditional judicial determination of a competitive rate level – part of a measurement of conspiracy-caused damages – is both eminently justiciable and completely in harmony with the

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[13] Other post-*Square D Keogh* rule antitrust cases outside the ICA context include one case where the *Keogh* rule was applied, *Berning v. Gooding,* 820 F.2d 1550 (9th Cir. 1987), and three more recent ones where its applicability was rejected. *Brown, supra,* 982 F.2d 393-94; *Wileman Bros. & Elliott, Inc. v. Giannini,* 909 F.2d 332, 337-38 (9th Cir. 1990); and *City of Long Beach v. Standard Oil Co. of California,* 872 F.2d 1401, 1409 (9th Cir. 1989), *cert. denied,* 493 U.S. 1076 (1990). *See generally* P. Areeda and H. Hovenkamp, *Antitrust Law* ¶ 227.2b at 252 (1993 Supp.) ("*Keogh*'s application becomes somewhat puzzling under partial deregulation.").

regulatory scheme. And when the relief sought is a damage award for the benefit of the entire class of victimized rate payers, there are no grounds for concern about the judgment's asserted discriminatory impact on rates. More generally, petitioners will demonstrate that *Keogh* simply has no role to play in connection with unlawful conduct that "involves horizontal price fixing under a vague imprimatur in form and agency inaction in fact." *Id.* at 2180. A *Keogh* defense in such situations would severely alter the delicate balance, struck by this Court only a year ago on identical facts, between procompetitive federal economic policy and anticompetitive conduct authorized by state action.

5. The Decision of the Wisconsin Supreme Court is in Direct Conflict With That of the Ninth Circuit and the Conflict is One That Should be Resolved by This Court

The importance of Supreme Court guidance on the question of the extent of applicability of *Keogh* outside the ICA context is great. Vast sums may turn on the determination of the circumstances under which the defense is available, both within the context of the ICA,[14] and in

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[14] *E.g., compare* the $660 million antitrust judgment affirmed in *In re Lower Lake Erie Iron Ore Antitrust Litigation*, 998 F.2d 1144, 1161 (3d Cir.) (rejecting application of *Keogh* to competitor claims), *pet. for cert. filed*, No, 93-643 (Oct. 25, 1993), *with* the defendants' verdict on the same conspiracy and involving the same defendants in *Pinney Dock & Transport Corp. v. Penn Central Corp.*, 838 F.2d 1445 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988) (applying *Keogh* to competitor claims). The petition in No. 93-643 has generated considerable amicus interest, but its

other contexts.[15] No more pertinent illustration of the need for guidance can be presented, however, than in connection with the conflict that exists between this case and the other efforts to hold many of the defendants in this action accountable for their widespread, multi-state price fixing on title insurance-related services. The FTC's determination that many of the defendants in this action were found to have violated § 5 of the FTC Act, 15 U.S.C. § 45, 112 F.T.C. 344 (1989), ultimately resulted in a ruling by this Court last year rejecting the industry claim that its price fixing on title insurance-related services was immune from antitrust scrutiny due to state action. As to Wisconsin (as well as other states) this Court's reasoning was that defendants could not demonstrate that state insurance regulators had

> exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate State intervention, not simply by agreement among private parties.

FTC v. Ticor, 112 S. Ct. at 2177.

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review by this Court would not resolve the issue presented here because, like *Keogh* and *Square D*, the asserted *Keogh* defense is based on ICA regulation. Review of both cases, however, would likely result in substantial clarification and resolution of the filed tariff doctrine issues that have generated the most lower-court conflict over the years.

[15] *Compare City of Kirkwood v. Union Elec. Co.*, 671 F.2d 1173 (8th Cir. 1982), *cert. denied*, 459 U.S. 1170 (1983); *City of Groton v. Connecticut Light & Power Co.*, 662 F.2d 921 (2d Cir. 1981); *with Newark v. Delmarva P&L Co.*, 467 F. Supp. 765, 769 (D. Del. 1979).

That assessment alone raises grave doubt that it makes any sense to extend *Keogh* to respondents' conduct. Yet a majority of the Wisconsin Supreme Court has done so, attaching an unspecified amount of significance to the fact that there was a latent role for after-the-fact regulatory intervention to address rates prospectively. App. 10.[16] But an antitrust damages remedy is not disruptive of such a toothless regulatory scheme.[17] And surely one lesson to be drawn from *FTC v. Ticor* is that if private price fixing on rates is effectively unsupervised, that scheme provides no basis for depriving victims of the

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[16] The court majority noted that under Wisconsin law, "the Insurance Commissioner shall disapprove any rate which will destroy competition." App. 10. They characterize this as the remedy for a restraint of trade under the antitrust laws. App. 10-11. But this appraisal ignored the fact, noted by Justice Abrahamson in dissent, that such remedies are prospective only. App. 15. Thus, the most that Wisconsin insurance purchasers and price fixing victims could hope for is regulatory insistence that, in the future, when no further purchase may be contemplated, the price fixing come to an end.

[17] That the existence of a viable administrative remedy may be pivotal to *Keogh* analysis is confirmed by recent cases extending the *Keogh* rule to RICO claims made in the vastly different context of pervasive public utility regulation, in Minnesota, *H.J. Inc. v. Northwestern Bell Tel. Co.*, 954 F.2d 485, 487-88, 491 & n.5, 493 (8th Cir.), *cert. denied*, 112 S. Ct. 2306 (1992) (finding pivotal the fact that the Minnesota PUC had lawfully reopened rates and ordered "a prospective rate decrease and a refund . . . . "; rates were subject to Minn. Stat. Ann. § 237.075, which imposes a 60-day advance rate filing requirement); and in Alabama and Georgia. *Taffet v. Southern Co.*, 967 F.2d 1483, 1490-93 (11th Cir.), *cert. denied*, 113 S. Ct. 657 (1992) (finding a 30-day advance rate filing requirement in both states, and noting the power of both states' PSC's to set prospective rates "low enough to compensate consumers for excesses paid in the past . . . . ").

conspiracy of their traditional statutory remedies for illegal conduct.[18] Faced with this exact question in the wake of *FTC v. Ticor*, the Ninth Circuit rejected defendant's efforts to apply *Keogh* to their price fixing in the States of Arizona and Wisconsin. *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 393-94 (9th Cir. 1992). That result, of course, is in direct conflict with the later decision of the Wisconsin Supreme Court in this case.[19]

In this case, respondents cannot even establish the most basic "filed tariff" requirement of all – the existence of a "filed tariff" that alone establishes the legal rights of ratepayers as against insurers. In *Square D*, this Court noted that *Keogh* was "not even implicated in Carnation . . . because the ratemaking agreements challenged in that

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[18] In *FTC v. Ticor*, after adopting the FTC findings on the wholesale absence of regulatory supervision of private price fixing in Wisconsin, 112 S. Ct. at 2174-75, this Court ruled that the actual execution of this statutory obligation in Wisconsin was so illusory in fact during the course of the conspiracy that no deference to Wisconsin regulation was justified in the face of a "pervasive and fundamental" national policy of "free enterprise without price fixing or cartels." *Id.* at 2176. The lower court's head-in-the-sand approach to this Court's appraisal of both respondents' conduct and the absence of any meaningful State intervention in Wisconsin may not be in direct conflict with this Court's precise legal ruling in *Ticor* on state action, but there can be no doubt that the two decisions are fundamentally inconsistent and irreconcilable from any but the narrowest perspective.

[19] The Court's limited grant of *certiorari* in *Brown*, 114 S. Ct. 56 (1993), gives no credence to defendants' claim that the Ninth Circuit's *Keogh* decision in *Brown* was "clear error" warranting "summary reversal." No. 92-1988, Petition for Writ of Certiorari 23; Reply Br. in Support of Pet. 9.

case had not been approved by, or filed with, the Federal Maritime Commission." 476 U.S. at 422 n.29. In that same sense, the rates filed with the Wisconsin Office of the Commissioner of Insurance ("OCI") do not implicate *Keogh*. Respondents told this Court in their *Brown* petition that Wisconsin "[t]itle insurers are expressly prohibited from charging any fee or rate other than those on file with the [Wisconsin OCI]." No. 92-1988, Reply Br. in Support of Pet. 9. The cited statutory provision, Wis. Stats. § 625.15, says nothing of the sort. Defendants ignore the pertinent – and flatly contrary – statute, Wis. Stats. § 625.13(1), which requires rates to be filed only "within 30 days *after* they become effective." (emphasis added).

This Court has already made clear that the respondents may not shield their private price fixing in Wisconsin behind any State imprimatur. But unless the Court takes this opportunity to clarify that price fixing in the context of competition-based regulatory schemes is subject to meaningful private redress under the antitrust laws by the victims of such conspiracies, such price fixing is likely to flourish. Perversely, the incentive to cartelize will be *strongest* amidst progressive regulatory schemes such as Wisconsin's that rely the *most* on competition rather than regulatory scrutiny to determine rates, and that rely the *least* on regulatory remedies for excessive rates. This case is a classic example. With no redress available from the OCI for excessive prior rates,[20] and

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[20] Unlike the public utility regulators involved in *H.J.*, *supra*, and *Taffet*, *supra*, the OCI has no power to order defendants or future ratepayers to compensate earlier victimized

with no damage remedy under the Wisconsin antitrust law, the putative members of the class in this class action have been told that the losses they suffered as a result of the respondents' plainly illegal conduct are effectively unredressable. This Court should grant certiorari to ensure that our free enterprise system is not burdened by the perverse incentives created by the decision below.[21]

6. The Wisconsin Supreme Court Also Failed to Apply Settled *Res Judicata* Principles to Rule Against Some of the Respondents

If the Court grants the writ, petitioners will also detail why the decision below is erroneous due to the collateral estoppel effect of the decision in *Brown*.[22] Petitioners' position below was that the case should be decided exclusively on state, not federal grounds. Consistent with that position, the *Brown* decision of December 28, 1992 was brought to the attention of the Wisconsin Supreme Court before the February 1, 1992 oral argument, and argued then only as persuasive authority by petitioners. Thereafter, on February 18, 1993, the Wisconsin Supreme Court made clear that Wisconsin would

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ratepayers via future rate adjustments or coerced payments. *See* Wis. Stats. § 625.12.

[21] The Court has previously granted *certiorari* when a lower-court decision "seemed to threaten the effectiveness of the private action as a vital means of enforcing the antitrust policy of the United States . . . . " *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 136 (1968).

[22] Petitioners present this claim as error reviewable in this Court, but not as an independent reason for granting the writ.

recognize the offensive use of collateral estoppel. *Michelle T. by Sumpter v. Crozier*, 173 Wis. 2d 681, 495 N.W. 2d 327 (1993). Then, on March 17, 1993, the Ninth Circuit denied rehearing in *Brown*. When the Wisconsin Supreme Court issued its June 9, 1993 decision in this case, petitioners promptly sought rehearing on the grounds, *inter alia*, that the court's appraisal that the federal *Keogh* rule was "controlling" thereby transformed the Ninth Circuit's *Brown* decision into a pre-existing and contrary federal appellate decision involving the same federal question and many of the same defendants. App. 22-23. Explicitly relying on the intervening *Crozier* decision, petitioners asked the court at the earliest available opportunity[23] to find the *Brown* defendants collaterally estopped from obtaining the benefit of a later, contrary federal law ruling in Wisconsin. App. 22-23. The motion was denied without opinion. App. 47.

Just a month before, the Wisconsin Supreme Court had ruled, petitioners believe correctly, that it was not bound to follow decisions of the federal courts of appeals in deciding federal questions. *State v. Mechtel*, 176 Wis. 2d 87, 94, 499 N.W. 2d 662, 666 (1993). If the court believed it was free to disagree with *Brown* under the *Mechtel* rule, however, it was mistaken. Unlike *Brown*, *Mechtel* did not involve a party that had litigated and lost on the same

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[23] The collateral estoppel issue was squarely presented only when the lower court ruled that it was applying federal law to decide the case. With respect to this Court's jurisdiction, therefore, petitioners' prompt motion for reconsideration timely raised this federal issue. *See Great Northern Rwy. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 366-67 (1932); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 677-78 (1930).

federal question in an earlier federal forum. *Id.* Wisconsin was obliged to apply *res judicata* principles to the *Brown* decision, *Stoli v. Gottlieb*, 305 U.S. 165, 170-71 (1938); *Kline v. Burke Construction Co.*, 260 U.S. 226, 231 (1922), and failed to do so. This failure raises a federal question reviewable by this Court. *Parsons Steel, Inc. v. First Alabama Bank*, 474 U.S. 518, 525 (1986); *Stoll v. Gottlieb, supra*, 305 U.S. at 167.

Respondents argued below that there was no "valid final judgment" in *Brown* to which collateral estoppel could apply. App. 38. There is no merit to this argument. The *Keogh* issue was finally resolved as a matter of law, without any possibility of a different outcome on remand to the district court in Arizona. The only recourse respondents had remaining (since all but totally foreclosed by this Court) was a petition for a writ of certiorari. Under these circumstances, there was, for all practical *res judicata* purposes, finality as to the *issue* precluded, even though the case is not over. *See* 18 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* § 4434 (1981) & (1993 Supp.).

CONCLUSION

The Court should grant the writ of certiorari to review and resolve the conflict between the Wisconsin Supreme Court and the Ninth Circuit on an important question of federal law, i.e., the proper application of the *Keogh* rule to regimes of regulation other than the Interstate Commerce Act.

Respectfully submitted,

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Nos. 91-0402, 91-1580

STATE OF WISCONSIN : IN SUPREME COURT

CHARLES E. PRENTICE and JANE G. PRENTICE, husband and wife on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

TITLE INSURANCE COMPANY OF MINNESOTA, CHICAGO TITLE INSURANCE COMPANY, STEWART TITLE GUARANTY COMPANY, SECURITY UNION TITLE INSURANCE COMPANY, f/k/a SAFECO TITLE INSURANCE COMPANY, LAWYERS TITLE INSURANCE CORPORATION, TICOR TITLE INSURANCE COMPANY, f/k/a PIONEER NATIONAL TITLE INSURANCE, FIRST AMERICAN TITLE INSURANCE COMPANY OF THE MIDWEST, f/k/a ST. PAUL TITLE INSURANCE CORPORATION, AMERICAN TITLE INSURANCE COMPANY, COMMONWEALTH LAND TITLE INSURANCE COMPANY, TRW TITLE INSURANCE COMPANY, f/k/a INSURED TITLE, INCORPORATED, NATIONAL ATTORNEY'S TITLE INSURANCE COMPANY, TITLE USA INSURANCE CORPORATION OF NEW YORK, f/k/a U.S. LIFE TITLE INSURANCE COMPANY OF NEW YORK, ALLAN F. MONTEZAN, as an individual and in his representative capacity on behalf of AM TITLE INS

CO., RICHARD F. TYSON, as an individual and in his representative capacity on behalf of AM TITLE INS CO, CHARLES B. SCHIERECK, as an individual and in his representative capacity on behalf of CHICAGO TITLE INSURANCE CO, JACK OLIVER, as an individual and in his representative capacity on behalf of, COMMONWEALTH LAND TITLE INSURANCE COMPANY, DUANE H. WUNSCH, as an individual and in his representative capacity on behalf of ASSOCIATE TITLE COUNSEL COMMONWEALTH LAND TITLE, INSURANCE COMPANY, DONALD GRABSKI, as an individual and in his representative capacity on behalf of LAWYERS TITLE INSURANCE CORPORATION, RICHARD STOPCZYNSKI, as an individual and in his representative capacity on behalf of LAWYERS TITLE INSURANCE CORPORATION, PHILIP M. LARKIN, as an individual and in his representative capacity on behalf of TICOR TITLE INSURANCE COMPANY and HARVEY POLLOCK, as an individual and in his representative capacity on behalf of TITLE INSURANCE COMPANY OF MINNESOTA,

Defendants-Respondents.

(Filed June 9, 1993)

APPEAL from a judgment of the Circuit Court for Milwaukee County. ***AFFIRMED.***

DAY, J. This is an appeal from a judgment of the circuit court for Milwaukee County, Hon. John E. McCormick, Judge. This appeal is before us on certification from the court of appeals pursuant to sec. 809.61, Stats.

In this class action suit, the plaintiffs allege that the defendants, through their participation in the Wisconsin Title Insurance Rate Service Organization ("WTIRSO"), violated sec. 625.33, Stats.[1] and sec. 133.03, Stats.[2] by agreeing to fix the prices of title insurance and related services. The question presented is whether the filed rate doctrine[3] precludes the plaintiffs' rate-related suit for damages even if the allegations are true. We hold that the filed rate doctrine shields the defendants from liability.

The defendants include twelve title insurance companies and several of their employees. Each title insurance company was a member of WTIRSO, a licensed title

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[1] **625.33 Binding agreements by insurers.** No insurer shall assume any obligation to any person other than a policy-holder or other companies under common control to use or adhere to certain rates or rules, and no other person shall impose any penalty or other adverse consequences for failure of an insurer to adhere to certain rates or rules.

[2] Sec. 133.03, Stats. provides in pertinent part:

133.03 Unlawful contracts; conspiracies. (1) Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce is illegal.

[3] Under the filed rate doctrine, also known as the filed tariff doctrine, the legal rights of a regulated entity and its customers in respect to a rate are measured solely by the filed rate. *See Keogh v. Chicago & Northwestern Railway Co.*, 260 U.S. 156, 163 (1922).

insurance rating bureau authorized by sec. 625.15, Stats.[4] to file joint rates on behalf of its members.

The plaintiff class consists of all persons who, during the period 1971 through at least 1984, purchased title insurance or related services from one or more of the defendants. The plaintiffs allege that the defendants and WTIRSO engaged in a conspiracy to unreasonably restrain trade, causing the plaintiffs to pay substantially higher prices for title insurance and related services than they would have had to pay in the absence of the alleged conspiracy. The plaintiffs seek treble damages under sec. 133.18, Stats.[5]

The defendants moved to dismiss the complaint on three separate grounds: (1) the filed rate doctrine; (2) the statute of limitation; and (3) an implied exemption from the Wisconsin antitrust laws. Several defendants, who

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[4] Sec. 625.15(2), Stats. provides:

"(2) Rate Filing. An insurer may discharge its obligation under s. 625.13(1) by giving notice to the commissioner that it uses rates and supplementary rate information prepared by a designated rate service organization, with such information about modifications thereof as is necessary fully to inform the commissioner. The insurer's rates and supplementary rate information shall be those filed from time to time by the rate service organization, including any amendments thereto as filed, subject, however, to the modifications filed by the insurer."

[5] Sec. 133.18, Stats provides in pertinent part:

"133.18 Treble damages; statute of limitations. (1) (a) Except as provided under par. (b), any person injured, directly or indirectly, by reason of anything prohibited in this chapter may sue therefor and shall recover threefold the damages sustained. . . . "

were previously defendants in an antitrust suit which was dismissed pursuant to a settlement approved by the federal district court in the Eastern District of Pennsylvania, also moved to dismiss on the basis of *res judicata*. While the circuit court dismissed some defendants on the basis of *res judicata*, the circuit court dismissed all defendants on the basis of the filed rate doctrine. The circuit court specifically reserved judgment on the implied exemption and statute of limitation issues.

The plaintiffs appealed and this court accepted certification from the court of appeals. We affirm the decision of the circuit court on the basis of the filed rate doctrine. Thus, we need not discuss any other issue.

The question of whether the filed rate doctrine shields the defendants from liability is a question of law. This court decides questions of law independently and without deference to the reasoning of the lower court. *Pulsfus Farms v. Town of Leeds*, 149 Wis. 2d 797, 803-804, 440 N.W.2d 329 (1989).

For nearly one hundred years, the United States Supreme Court has held that the filed rate doctrine prohibits a plaintiff from claiming a lower rate than the one filed by a regulated entity with the appropriate regulatory agency because the filed rate alone governs the relationship between the parties. *See Texas & Pacific Railway Co. v. Mugg*, 202 U.S. 242 (1906); *Louisville & Nashville Railroad Co. v. Maxwell*, 237 U.S. 94 (1915). The Court reasoned that allowing a state court to award damages based on a hypothetical rate lower than the filed rate would undermine the regulatory scheme because a plaintiff could obtain greater relief from the court than from

the regulatory agency. *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 579 (1981). The filed rate doctrine "has been extended across the spectrum of regulated utilities." *Id.* at 577.

The United States Supreme Court first applied the filed rate doctrine to an antitrust claim in *Keogh v. Chicago & N.W. Railway Co.*, 260 U.S. 156, 163 (1922). In *Keogh*, the plaintiff alleged that the defendants, freight carriers, formed an association to eliminate competition in violation of the federal antitrust laws. Furthermore, the plaintiff alleged that the association set rates higher than it would have if competition had not been quashed. The plaintiff claimed the extent of this difference as damages. The defendants pointed out that every rate complained of had been duly filed and approved by the Interstate Commerce Commission before it was made effective.

The Court held that the filed rate doctrine barred the plaintiff's claim and the regulatory agency provided the plaintiff's sole source of relief. *Id.* at 162. The Court concluded that the regulatory agency provided the plaintiff a remedy and refused to provide an additional remedy under the antitrust laws. *Id.* The Court reasoned that the regulatory agency's approval had, in effect, established the lawfulness of the defendants' rates and the legal rights of the parties were measured solely by the filed rate. *Id.* at 163. The Court explained that an award under the antitrust laws would undermine the regulatory scheme by acting as a rebate available only to the plaintiff. *Id.* Furthermore, The Court was troubled by the fact that the plaintiff, in addition to proving that the defendant would have maintained a lower rate in the absence of the illegal conspiracy, would have to prove that the

regulatory agency would have approved the hypothetical lower rate. *Id.* at 163-64.

Although this case presents the first opportunity for this court to follow the rule announced in *Keogh* and apply the filed rate doctrine to an antitrust claim, this court has applied the filed rate doctrine in different contexts since 1911. *See City of Manitowoc v. Manitowoc & Northern Traction Co.*, 145 Wis. 13, 129 N.W. 925 (1911); *Kilbourn City v. Southern Wisconsin Power Co.*, 149 Wis. 168, 135 N.W. 499 (1912); *Oconto Electric Co. v. Peoples Land & Mfg. Co.*, 165 Wis. 467, 161 N.W. 789 (1917). This court, in *Manitowoc*, held that a rate filed with and found reasonable by the railroad commission becomes the lawful rate and supersedes any contractual rate that differs from the filed rate. *Manitowoc*, 145 Wis. at 30. In *Kilbourn City*, this court held that parties dealing with public-service corporations must pay the filed rate for the services performed and stated that "[a]ll subterfuges whereby one consumer is called upon to pay a greater or a lesser rate than that prescribed in the published schedule of charges . . . are condemned." *Kilbourn City*, 149 Wis. at 181. Similarly, in *Oconto*, this court stated that a rate filed with the railroad commission becomes "presumptively reasonable and enforceable until a different rate is established in place thereof by the railroad commission pursuant to law." *Oconto*, 165 Wis. at 485.

This court applied the filed rate doctrine in *Chicago & N.W. Transportation Co. v. Thoreson Food Products, Inc.*, 71 Wis. 2d 143, 238 N.W.2d 69 (1976). In *Thoreson*, the plaintiff, a freight carrier, allegedly damaged some of the defendant's freight. After the next shipment, the defendant sent the plaintiff a check for an amount which

represented the filed rate minus the claimed damages from the previous shipment. The check bore a notation stating "in settlement of the above account." The plaintiff cashed the check and brought suit to collect the full amount of the filed rate. The defendant relied on the doctrine of accord and satisfaction. This court, however, did not allow the defense of accord and satisfaction because the filed rate was binding on both parties and any agreement, implied or express, by the carrier to offset damage claims against freight charges was rendered null and void as a deviation from the filed rate. *Id.* at 147-48.

While this court has applied the filed rate doctrine on numerous occasions, plaintiffs cite no case in which this court refused to apply the doctrine. Additionally, "[w]e have stated many times that the construction of sec. 133.01(1) is controlled by federal decisions under the Sherman Act." *State v. Waste Management of Wisconsin, Inc.*, 81 Wis. 2d 555, 569, 261 N.W.2d 147 (1977). The United States Supreme Court recently examined and expressly reaffirmed the holding in *Keogh*. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986). This court's policy of conforming our antitrust decisions to those of the United States Supreme Court, coupled with this court's history of consistently applying the filed rate doctrine, leads us to adopt the reasoning of the United States Supreme Court's decision in *Keogh*.

The plaintiffs contend that *Keogh* does not apply to the present case. Sec. 625.13, Stats. mandates that insurers file a rate with the Commissioner of Insurance within thirty days after the rate becomes effective. The plaintiffs contrast this system with the system in *Keogh* where rates were filed and approved before use. Relying on this

distinction, the plaintiffs claim that *Keogh* applies only where the regulatory scheme mandates filing and approval before use and does not apply where the rates may be used before filing.

We conclude, however, that the distinction between "file before use" and "use before file" schemes does not render *Keogh* inapplicable to the present case. In *Square D*, the United States Supreme Court refused to limit *Keogh* to cases where rates had been investigated and approved before use. *Square D*, 476 U.S. at 417. Under *Keogh*, as interpreted by *Square D*, the existence of a regulatory remedy bars a private rate-related suit for damages under the antitrust laws regardless of whether the regulatory body approved the rates before or after the rates became effective.

Like the regulatory scheme in *Keogh*, the Wisconsin Insurance Code provides a regulatory remedy which bars a private rate-related suit for damages. In 1969, the Legislature revised the Insurance Code by replacing a system under which rates were not effective until approved with the current system which allows insurers to set rates as long as they file the rates within thirty days. The plaintiffs contend that the goal of this revision was to promote independent competition among the insurers and limit regulation. The Committee Comments accompanying the revision, however, state that "because competition is not perfect, it cannot be relied on completely." 1969 Wis. Laws Ch. 144 at 257. Furthermore, the Legislature warned that "it does not seem advisable to completely abandon all rate regulation. Rates must be filed after they have begun to be used, and **the commissioner's power to**

intervene decisively is clearly preserved." *Id.* at 255 (emphasis added).

Although the Legislature intended to promote competition among insurers, the 1969 revision did not eviscerate the power of the Insurance Commissioner. For example, sec. 601.41, Stats. grants the Commissioner the broad authority to administer and enforce Chapter 625. Sec. 625.04, Stats. authorizes the Commissioner to create exemptions. Sec. 625.16, Stats. allows the Commissioner to establish reasonable minimum standards for loss ratios of medicare supplement policies, medicare replacement policies and long-term care insurance policies. Secs. 625.21 and 625.23[6], Stats. grant the Commissioner the power to require that certain rates be filed and approved before they are made effective.

Most importantly, sec. 625.22, Stats. grants the Commissioner the power to disapprove any rate not in accordance with sec. 625.11, Stats. Sec. 625.11, Stats. states that "[r]ates shall not be excessive, inadequate or unfairly discriminatory, **nor shall an insurer charge any rate which if continued will have or tend to have the effect of destroying competition or creating a monopoly.**" (emphasis added). Read together, secs. 625.22 and 625.11, Stats. provide that the Insurance Commissioner shall disapprove any rate which will destroy competition. Thus,

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[6] Although the plaintiffs claim that a series of rate changes could result in a situation where the rate on file is never the rate being charged, the Committee Comments to sec. 625.23, Stats. explain that "[o]ne purpose of this section is to prevent 'flash filings' to circumvent the 'use-and-file' provisions of s. 625.13." 1969 Wis. Laws Ch. 144 at 262.

Chapter 625 provides a remedy when an insurer restrains trade in violation of sec. 133.03, Stats.

Under the filed rate doctrine as enunciated in *Keogh*, the availability of such a regulatory remedy bars a private rate-related suit for damages.[7] To hold otherwise would undermine the regulatory scheme by allowing courts to award damages based on a rate which was never filed with the Insurance Commissioner. If courts were authorized to determine whether a hypothetical rate would have been approved by the Insurance Commissioner, we would place insurers in a procrustean bed where one rate must conform to the requirements of both the Insurance Commissioner and a trier of fact. In order to uphold the regulatory scheme enacted by the Legislature, we conclude that the Insurance Commissioner serves as the plaintiffs' sole source of relief.

The Committee Comments to the 1969 revision of the Insurance Code support this conclusion. The Comments expressly state that "[r]ate regulation is not a place for formal, quasi-litigious proceedings. The process is a very technical one better suited to less formal processes. . . . No one other than the insurer and the commissioner should have a formal place in rate procedures-i.e. should have 'standing.' It is the commissioner's job to protect the public and any remedies against him should not be built

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[7] We note that the filed rate doctrine does not provide absolute immunity from the antitrust laws. For example, the filed rate doctrine does not protect against suits by the government or private suits which do not seek rate-related damages.

into the rate review procedure but should be more general and applicable to any malfeasance or nonfeasance in office." 1969 Wis. Laws Ch. 144 at 262.

We disagree with the plaintiffs' contention that the United States Supreme Court's recent decision in *FTC v. Ticor Title Insurance Co.*, 119 L. Ed. 2d 410 (1992) applies to this case. In *Ticor,* The Court decided whether several title insurers operating in Wisconsin were immune from federal antitrust liability under the state action doctrine. The state action doctrine shields conduct that would otherwise be illegal from antitrust liability if: (1) the challenged restraint is clearly articulated and affirmatively expressed as a state policy; and (2) the state actively supervises the policy. *Id.* at 421-24. The Court found that the state action doctrine did not apply because the Wisconsin Insurance Commissioner did not actively supervise the rate-making procedure. This determination, however, does not change the fact that the Wisconsin Insurance Code provides the plaintiffs with a remedy for the violations alleged in the present case. As pointed out previously, the Insurance Commissioner, pursuant to secs. 625.11 and 625.22, Stats., must disapprove any rate which restrains trade. Thus, the *Ticor* decision is not relevant to the present case.

Finally, we acknowledge the plaintiffs' claims that WTIRSO operated in violation of the Insurance Code. These claims, even if true, do not alter our conclusion. The plaintiffs in *Square D* claimed that the defendants, members of the Niagara Frontier Tariff Bureau, Inc. ("NFTB"), did not comply with the terms of the bureau agreement and engaged in conduct that either was not or

could not be approved by the regulatory agency. Specifically, the plaintiffs alleged that the defendants: (1) used a committee which was not authorized by the NFTB agreement to set rates and inhibit competition; (2) set and controlled NFTB rate levels without complying with the notice, publication, public hearing, and recordkeeping requirements of the NFTB agreement and ICC regulations; (3) planned threats, retaliation, and coercion against NFTB members to inhibit independent actions; (4) used pressures, threats, and retaliation to interfere with independent action; and (5) filed tariffs with the ICC. Thus, the plaintiffs in *Square D,* who alleged violations of the ICC as well as the antitrust laws, are similar to the plaintiffs in the present case who claim violations of the Insurance Code as well as the antitrust laws. Nevertheless, the Court held that the filed rate doctrine shielded the defendants from treble damages liability under the antitrust laws. 476 U.S. at 417. In the case before us, the circuit court likewise properly dismissed the complaint, which seeks treble damages, on the basis of the filed rate doctrine.

By The Court. – The judgment of the circuit court is affirmed.

Justice Steinmetz and Justice Ceci did not participate in this opinion.

NOTICE

This opinion is subject to further editing and modification. The final version will appear in the bound volume of the official reports.

Nos. 91-0402, 91-158O

STATE OF WISCONSIN : IN WISCONSIN

CHARLES E. PRENTICE and JANE G. PRENTICE, husband and wife on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

TITLE INSURANCE COMPANY OF MINNESOTA, et al.

Defendants-Respondents.

(Filed June 9, 1993)

Shirley S. Abrahamson, J. (dissenting). The filed tariff doctrine applies where the legal rights of a regulated entity and its customers in respect to a rate are measured solely by the filed rate. Maj. op. at 2, n. 3, citing *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156, 163 (1922). The theory underlying the doctrine is that the lawfulness of the rates has been established by the filing and that no customers can claim that a rate has "injured" them "in their "business or property" within the meaning of the antitrust laws. *Square D Co. v. Niagara Tariff Bureau*, 476 U.S. 409, 416 (1985).

The cornerstones of rate regulation under the Wisconsin Insurance Code are competition and rate-setting

by the insurers. Sec. 625.01(2)(c), Stats. 1991-92; Committee Comment, West's Wis. Stat. Ann. ch 625 at 2 (1980). There is no active supervision by Wisconsin officials of title insurance rates. Rate filings are at most checked for mathematical accuracy. *FTC v. Ticor Title Insurance Co.*, ___ U.S. ___, 119 L. ed. 2d 410, 420 (1992). The remedies provided under the insurance code for rates declared excessive, inadequate or unfairly discriminatory are prospective only. Secs. 625.11, 625.22, Stats. 1991-92.

I conclude that the system of title insurance rate regulation in this state does not constitute a sufficiently comprehensive or pervasive control of rates to ensure that only lawful rates are charged to consumers, and therefore the regulatory system does not implicate the filed tariff doctrine.

STATE OF WISCONSIN
IN SUPREME COURT

CHARLES E. PRENTICE and JANE G. PRENTICE, husband and wife, on behalf of themselves and all others similarly situated,
Court

PLAINTIFFS-APPELLANTS

v.

TITLE INSURANCE COMPANY OF MINNESOTA, CHICAGO TITLE INSURANCE COMPANY, STEWART TITLE GUARANTY COMPANY, SECURITY UNION TITLE INSURANCE COMPANY, (f/k/a SAFECO TITLE INSURANCE COMPANY), LAWYERS TITLE INSURANCE CORPORATION, TICOR TITLE INSURANCE COMPANY, (f/k/a PIONEER NATIONAL TITLE INSURANCE COMPANY), FIRST AMERICAN TITLE INSURANCE COMPANY OF THE MID-WEST, (f/k/a ST. PAUL TITLE INSURANCE CORPORATION), AMERICAN TITLE INSURANCE COMPANY, COMMONWEALTH LAND TITLE INSURANCE COMPANY, TRW TITLE INSURANCE COMPANY, (f/k/a

Court of Appeals
Case Nos. 91-0402
and 91-1580 on
Consolidated Appeal

Milwaukee Circuit

Case No. 89 CV 12004
Unclassified
(Case Classification
Type) 30703

(case Code)
(Antitrust)

INSURED TITLE INCORPORATED), NATIONAL ATTORNEY'S TITLE INSURANCE COMPANY, TITLE USA INSURANCE CORPORATION OF NEW YORK, (f/k/a U.S. LIFE TITLE INSURANCE COMPANY OF NEW YORK), ALLAN F. MONTEZAN, as an individual and in his representative capacity on behalf of AMERICAN TITLE INSURANCE COMPANY, RICHARD F. TYSON, as an individual and in his representative capacity on behalf of AMERICAN TITLE INSURANCE COMPANY, CHARLES B. SCHIERECK, as an individual and in his representative capacity on behalf of CHICAGO TITLE INSURANCE COMPANY, JACK OLIVER, as an individual and in his representative capacity on behalf of COMMONWEALTH LAND TITLE INSURANCE COMPANY, DUANE H. WUNSCH, as an individual and in his representative capacity as Associate Title Counsel on behalf of COMMONWEALTH LAND TITLE INSURANCE COMPANY, DONALD GRABSKI, as an individual and in his representative capacity on behalf of LAWYERS TITLE INSURANCE CORPORATION, RICHARD

STOPCZYNSKI, as an individual and in his representative capacity on behalf of LAWYERS TITLE INSURANCE CORPORATION, PHILIP M. LARKIN, as an individual and in his representative capacity on behalf of TICOR TITLE INSURANCE COMPANY, HARVEY POLLOCK, as an individual and in his representative capacity on behalf of TITLE INSURANCE COMPANY OF MINNESOTA,
DEFENDANTS-RESPONDENTS

PLAINTIFFS'-APPELLANTS MOTION FOR RECONSIDERATION

TO: Ms. Marilyn L. Graves
Clerk of the Supreme Court
of Wisconsin
P.O. Box 1688
Madison, Wisconsin 53701

Plaintiffs-Appellants, in Appeal Nos. 91-0402, and 91-1580 on consolidated appeal, respectfully move this court, pursuant to Rule 809.64, and Rule 809.14 for reconsideration of the Court's decision, dated June 9, 1993, on the basis of controlling legal precedent and the important policy considerations set forth below.

1. Reconsideration Would Allow The Court To Reconcile Its Decision With Directly Conflicting, Controlling, And Binding Federal Precedent in *Brown v. Ticor.*

The Court's opinion does not address the conflict between its holding, based on federal law, and the directly contrary holding of the United States Court of Appeals for the Ninth Circuit in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *reh. en banc denied* March 17, 1993, *petition for cert. filed*, Dkt. No. 92-1988 (U.S. June 15, 1993). The MDL 633 defendants brought this decision (together with their then pending motion for rehearing) to the Court's attention on January 18, 1993, shortly before the oral argument in this *Prentice* case.

The *Brown* decision has two bases. First, it holds broadly that under the Wisconsin insurance scheme, which does not require approval of filed rates, the Commissioner's failure to disapprove the defendants' title insurance rates did not "legitimize" them under *Keogh*. 982 F.2d at 394.

Second, countering the defendants' erroneous (but as they realized essential) insistence that the rates they filed in Wisconsin were the only rates they could legally have charged, the Brown court also held (*id.*):

> [I]f those rates were the product of unlawful activity prior to their being filed and were not subjected to meaningful review by the state, then the fact that they were filed does not render them immune from [Sherman Act] challenge. The absence of meaningful review allows the insurers to file any rates they want. Therefore, the act of filing does not legitimize a rate arrived at by improper action.

The *Brown* decision is a conclusive statement that under the Sherman Act, the filed tariff doctrine (often referred to as the filed rate doctrine) is not applicable to

the unlawful price fixing activities of Wisconsin title insurers. Moreover, in its *Prentice* opinion, this Court stated that its interpretation of Wisconsin's antitrust law. " ' . . . is *controlled* by federal decisions under the Sherman Act.' " *Prentice v. Title Ins. Co. of Minn.*, No. 91-0402, 91-1580, 1993 Wisc. LEXIS 526, at 10 (June 9, 1993), quoting *State v Waste Management of Wisconsin, Inc.*, 81 Wis. 2d 555, 569, 261 N.W.2d 177 (1977) (emphasis added). Hence, appellants respectfully suggest that this Court should reconsider its holding that the filed tariff doctrine applies to Wisconsin title insurance rates.

The *Brown* court recognized, just as this Court did, that the Wisconsin system, though based on competition, does not rely on it completely but preserves power in the Commissioner to disapprove rates prospectively. But it also saw that the Wisconsin system never creates filed rates of the kind that *Keogh* protects: under the Wisconsin insurance code no filed rate is ever the only legal rate that may be charged. It is never "legitimized" in the *Keogh* sense, as the rate that "*alone* governs the relationship between the parties." *Prentice*, at 6, (emphasis added). A new rate may be adopted and used by an insurer at any time. Under the Wisconsin insurance code *that unfiled rate is legal*. "No approval is required and a filing is required only for information and after the fact." 1969 Wis. Laws Ch. 144, Preliminary Comment, at 256. Filing the new rate does not alter its status. It was legal from the time it was first used. But the new rate is as vulnerable to change before or after its filing, as was the filed or unfiled rate it displaced.

The fact that the regulatory system provides that insurers may legally charge a new, unfiled rate at any

time is determinative. For application of the filed tariff doctrine, there must be a filed rate that the regulatory scheme has made the *only* rate that may legally be charged. This was an element of the regulatory scheme in every Wisconsin case, as well as the federal cases including *Keogh*, which applied the filed tariff doctrine prior to the *Prentice* decision. The doctrine does not itself create the unique legal rate. It simply protects such rates from erosion through private contract or tort or, in the case of its extension to antitrust in *Keogh*, imposition of rate-based antitrust damages. In Wisconsin the system of insurance regulation itself allows, indeed encourages, insurers to change rates freely in response to market forces. The filed rate doctrine cannot be invoked to protect a filed rate when the regulatory system itself does not.[1]

That rate changes are legal under the Wisconsin insurance law does not mean that change will be constant, any more than giving the Commissioner responsibility for dealing with anticompetitive behavior means that he will always detect it, as the long-term success of the 15-year price fixing conspiracy here demonstrates. During that time the Commissioner never held a hearing,

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[1] For example, in *Square D Co. v. Niagra Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), the ICC rates were filed and had by statutory process become the *only* rate that could legally be charged, absent another filing. See *id.* at 417. Appellants are unaware of any case – and respondents cited none – that holds that a private entity, though free to change its rates at any time without filing, can nevertheless invoke *Keogh* to avoid rate-based damages for illegal price fixing on the theory that no other rate could lawfully have been charged.

much less used his intentionally limited power to disapprove any title insurance rate, filed or unfiled. If he had, he could have done no more than possibly shorten the life of the conspiracy. Sec. 625.22, Stats. Such prospective action does not redress the victim (often a one-time and at best very occasional buyer) for wrongs already sustained. It does nothing to make him whole nor does it offer any practical benefit that would induce the victim to request the Commissioner to act. Under the Wisconsin system, redress for past anticompetitive wrongs in title insurance can come only from the Wisconsin antitrust laws.

Moreover, only the risk of such liability can deter collusive, anticompetitive conduct when the regulatory authority has such limited powers. Without antitrust damage liability, the only sanction for unlawful price fixing by title insurers is a prospective prohibition on continuing such conduct. Such a situation would invite rather than deter collusion.

Accordingly, *Brown* correctly applies the filed tariff doctrine and represents a conclusive holding under the Sherman Act on its application to damage claims for price fixing by Wisconsin title insurers.

There is an additional reason why *Brown* has great significance for this case. Subsequent to the argument in this case, the Court clarified and strengthened the rule on collateral estoppel in *Michelle T by Sumpter v. Crozier*, 173 Wis. 2d 681, 495 N.W.2d 327 (1993). The six *Brown* defendants are the MDL 633 defendants here. Under *Crozier*, having fully litigated and lost the filed tariff issue in *Brown*, they are bound by *Brown*. From at least the time

rehearing was denied, they were estopped from relitigating the filed tariff issue here.

The other defendants here were co-conspirators in and privy to the price fixing activities carried on under cover of the Wisconsin rate organization at issue here and in Brown. They were fully aware of the *Brown* litigation, which began after the filing of the complaint in this case. They should in fairness also be bound by the Ninth Circuit's *Brown* decision. Indeed, this Court's decision to adhere to the federal filed tariff doctrine would produce that result and have the desirable effect of reducing unnecessary relitigation and the risk of conflicting results when federal and state litigation include slightly different sets of defendants.

In light of these considerations, appellants respectfully suggest that the Court order reconsideration in this case. The Court may desire further briefing on the issues presented by *Brown* and *Crozier*. Alternatively, it could simply limit its adoption of the filed tariff doctrine in the antitrust context to exclude title insurance price fixing in conformity with the result in the *Brown* case.

2. Section 133.14, Stats., Of The Wisconsin Antitrust Law Provides An Alternative Remedy For Collusive Price-Fixing And Presents Important Practical And Policy Questions Suggesting Further Consideration By This Court.

Wisconsin antitrust law, unlike federal antitrust law, explicitly provides victims of price-fixing conspiracies with an alternative remedy – the voiding of illegal contracts and the full refund of all moneys paid in connection therewith. Sec. 133.14, Stats. Thus, if the defendant

title insurers in fact set their prices by unlawful collusion, a fact which must be assumed given the procedural posture of this case, the resulting title insurance contracts are "void" and "[a]ny payment made upon . . . such contract . . . may be recovered. . . . " *Id.* This Court has sustained the constitutionality of this possibly "onerous" remedy. *City of Madison v. Hyland, Hall,* 73 Wis. 2d 364, 389, 243 N.W.2d 422 (1976).

The filed tariff doctrine only denies to victims of unlawful price fixing use of the conventional measure of damages (sec. 133.18(1)(a), Stats.) – damages based on proven overcharges. Proof of such damages requires establishing a hypothetical competitive price lower than the filed rate. Recognizing the well established, limited scope of the filed tariff doctrine, footnote 7 of the Court's opinion states: " . . . the filed rate doctrine does not provide absolute immunity from the antitrust laws. For example, the filed rate doctrine does not protect against . . . private suits which do not seek rate-related damages." *Prentice* at 10 n.7.

The remedy provided in sec. 133.14, Stats., is not "rate-related" and does not create any of the problems that justified the filed tariff doctrine. Voiding the contracts and refunding the entire purchase price would ensure that no trier of fact in an antitrust case would have to consider what the competitive price would have been or whether or not such a hypothetical price would have satisfied regulatory criteria. Title insurers would face no "procrustean bed" with respect to rates. *Prentice* at 10. Thus, this remedy satisfies the policy concerns underlying *Keogh* and is entirely consistent with the limitations expressed in note 7 of the *Prentice* decision. Of course, the

courts will have to fashion an appropriate remedy for those insureds who must or want to retain the benefits of their title insurance contract.

Before outlining for the Court a suggested approach to evaluating the relationship of the voiding remedy to its decision in this case, we briefly itemize three additional relevant considerations.

a. Only An Implied Exemption From Antitrust For Title Insurers Would Eliminate This Remedy But Such A Result Would Reverse Long Standing Precedents Of This Court.

To eliminate the liability of the title insurers for both conventional damages and the voiding remedy would require the Court to create an expansive implied exemption from Wisconsin's antitrust law. This would necessitate the Court's reversing its long standing decisions with respect to the relationship of claims under the state's antitrust law to the insurance law. E.g. *Grams v. Boss*, 97 Wis. 2d 332, 294 N.W. 2d 473 (1980). Such a result would also be inconsistent with the wording and policy of chapters 133 and 625, Stats. Appellants respectfully submit that immunity from *both* types of antitrust liability can be achieved only by a dramatic reversal of current law.

b. The Statute Confers On Plaintiffs With A Good Substantive Cause Of Action The Right To Any Lawful Remedy Even If Their Pleadings Do Not Expressly Request It.

Sec. 806.01(c), Stats., grants a plaintiff with a good substantive cause of action any remedy to which the plaintiff is entitled regardless of whether that particular

remedy was expressly sought in the pleadings. Hence, assuming that the filed tariff doctrine does shield title insurers from conventional damage claims, the mandate in the opinion should allow further proceedings consistent with footnote 7 and the alternative remedy provided by sec. 133.14, Stats.

c. The Statute Of Limitation Has Been Tolled As To All Members Of This Class.

Finally, appellants invite the Court's attention to sec. 133.18(2), Stats., which tolls the statute of limitations as to all members of an antitrust class action during the pendency of that action. This tolling provision suggests that even if the Court concludes that sec. 806.01(c), Stats., should not apply and this particular action must be dismissed, the class, through other representatives, can refile this action and pursue its alternative remedy under sec. 133.14, Stats.

* * *

These considerations make it all the more appropriate that the Court reflect further on its decision to apply the filed tariff doctrine to Wisconsin title insurers. Absent the filed tariff barrier, appellants had been prepared to forego the voiding remedy and limit their claims for relief to damages based on the actual overcharges. This would link the measure of liability to the loss that the wrongdoers actually caused and avoid the potentially "onerous" result of voiding all contracts and compelling the shareholders of the defendants' companies to incur the cost of refunding all payments received for the lengthy duration of the conspiracy.

Taking express account of the contract-voiding remedy in deciding whether to apply the filed tariff doctrine in this situation will, therefore, serve the interest of all the parties as well as the public interest in a comprehensive appraisal of the remedial provisions of Wisconsin's antitrust law in relation to title insurance. An additional factor pointing to such reconsideration is this Court's recent decision in *GTE North, Inc. v. Public Service Commission*, No. 92-0552, 1993 Wisc. LEXIS 515 (June 3, 1993), which upholds a 100% refund of charges collected in violation of a filed tariff as appropriate public policy in the context of Wisconsin public utility regulation of telephone companies.[2]

In the alternative, given the general right of a plaintiff to amend a complaint prior to the point at which the defendant answers or discovery begins, together with the specific right to an appropriate and lawful remedy for a valid cause of action whether or not expressly sought,

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[2] The regulatory scheme in *GTE North* is distinguishable from that governing the title insurance industry. Wisconsin telephone companies must strictly adhere to the terms of tariffs already on file at the P.S.C. Sec. 196.20, Stats. In contrast, as discussed above, title insurers have the absolute right to change rates and begin charging those rates at any time provided only that they gave notice to the Commissioner within 30 days after having done so. Moreover, once an insurer has collected its new premium, the Commissioner, unlike the P.S.C., has no power to force refunds but may only order prospective "discontinu[ance]." Sec. 625.22(1), Stats. Telephone companies could have such rate-setting freedom only if the P.S.C., under sec. 196.195, Stats., were to determine that sufficient competition exists to justify eliminating the otherwise required strict adherence to filed tariffs.

sec. 806.1(c), Stats., the Court may prefer to remand this case for further proceedings. This is particularly appropriate when the dismissal based on the pleadings rests only on the lack of remedy for what at this stage must be assumed to be a violation of the antitrust law.

In considering the option of remand, the Court would also have to take account of the alternative ground, briefed and argued, for dismissal as to the MDL 633 defendants – res judicata. Again, however, the *Brown* case is dispositive. The Brown decision rejected the res judicata claim of the MDL 633 defendants even as to the federal antitrust claims involved in *Brown*, on constitutional grounds equally applicable to the state law claims involved in *Prentice*. 982 F.2d at 390-392. Hence, under *Crozier*, collateral estoppel exists as to that issue. Therefore, given the limited scope of the filed tariff doctrine, the appropriate mandate, assuming that the filed tariff doctrine is to govern title insurance price fixing in Wisconsin, would seem to be to remand this case so that plaintiffs may amend their complaint to assert the remedy to which they remain entitled.

Even if the Court were to conclude that this motion must be denied, the appellants respectfully suggest that, in light of the tolling provisions of sec. 133.18(2), Stats., the Court should provide express guidance to the Wisconsin victims of title insurance price fixing not bound by this judgment, i.e., the unnamed members of this class action, on whether they are entitled to pursue their alternative remedy under sec. 133.14, Stats.

DATED: June 25, 1993

Respectfully submitted

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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 91-0402
Case No. 91-1580
on Consolidated Appeal

Milwaukee Circuit Court
Case No. 89CV012004

CHARLES E. PRENTICE and JANE G. PRENTICE, husband and wife, on behalf of themselves and all others similarly situated,

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v.

TITLE INSURANCE COMPANY OF MINNESOTA, CHICAGO TITLE INSURANCE COMPANY, STEWART TITLE GUARANTY COMPANY, SECURITY UNION TITLE INSURANCE COMPANY, (f/k/a SAFECO TITLE INSURANCE COMPANY), LAWYERS TITLE INSURANCE CORPORATION, TICOR TITLE INSURANCE COMPANY, (f/k/a PIONEER NATIONAL TITLE INSURANCE COMPANY), FIRST AMERICAN TITLE INSURANCE COMPANY OF THE MID-WEST, (f/k/a ST. PAUL TITLE INSURANCE CORPORATION), AMERICAN TITLE INSURANCE COMPANY, COMMONWEALTH

LAND TITLE INSURANCE COMPANY, TRW TITLE INSURANCE COMPANY, (f/k/a INSURED TITLE INCORPORATED), NATIONAL ATTORNEY'S TITLE INSURANCE COMPANY, TITLE USA INSURANCE CORPORATION OF NEW YORK (f/k/a U.S. LIFE TITLE INSURANCE CORPORATION OF NEW YORK), ALLAN F. MONTEZON, as an individual and in his representative capacity on behalf of AMERICAN TITLE INSURANCE COMPANY, RICHARD F. TYSON, as an individual and in his representative capacity on behalf of AMERICAN TITLE INSURANCE COMPANY, CHARLES B. SCHIERECK, as an individual and in his representative capacity on behalf of CHICAGO TITLE INSURANCE COMPANY, JACK OLIVER, as an individual and in his representative capacity on behalf of COMMONWEALTH LAND TITLE INSURANCE COMPANY, DUANE H. WUNSCH, as an individual and in his representative capacity as Associate Title Counsel on behalf of COMMONWEALTH LAND TITLE INSURANCE COMPANY, DONALD GRABSKI, as an

individual and in his representative capacity on behalf of LAWYERS TITLE INSURANCE CORPORATION, RICHARD STOPCZYNSKI, as an individual and in his representative capacity on behalf of LAWYERS TITLE INSURANCE CORPORATION, PHILIP M. LARKIN, as an individual and in his representative capacity on behalf of TICOR TITLE INSURANCE COMPANY, HARVEY POLLACK, as an individual and in his representative capacity on behalf of TITLE INSURANCE COMPANY OF MINNESOTA,

Defendants-Respondents.

DEFENDANTS-RESPONDENTS' RESPONSE TO PLAINTIFFS-APPELLANTS' MOTION FOR RECONSIDERATION

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INTRODUCTION

In asking this Court to reconsider its decision, plaintiffs have rehashed prior arguments, reversed their position on the precedential value of federal cases, and offered new arguments that were never raised in the circuit court, in the briefs or at oral argument. Remarkably, plaintiffs even ask this Court to issue a revised decision that provides an advisory opinion on the effect of Wis. Stat. § 133.14 and on the limitations period applicable to *other* potential plaintiffs. Nothing in plaintiffs' motion justifies the Court changing its decision, and the Court should deny the motion to reconsider.

ARGUMENT

I. The Ninth Circuit Decision in *Brown* Does Not Justify Reconsideration of This Court's Proper Interpretation of Wisconsin Filed Rate Doctrine Precedent and The United States Supreme Court Decisions in *Keogh* and *Square D.*

Plaintiffs devote much of their motion to the Ninth Circuit decision in *Brown v. Ticor Title Ins. Co.*, 982 F.2d

386 (9th Cir. 1992), petition for certiorari filed, Docket No. 92-1988 (June 15, 1993). In fact, the MDL defendants brought the *Brown* decision to the attention of this Court and plaintiffs' counsel several weeks prior to oral argument. Both plaintiffs' counsel and counsel for the defendants discussed the *Brown* decision during the oral argument.

Notwithstanding this, the motion for reconsideration principally urges *Brown* as authority for an argument previously made. Plaintiffs once again argue that the "use before file" system of insurance rate regulation employed by Wisconsin renders the filed rate (*Keogh*) doctrine inapplicable, and plaintiffs claim that *Brown* supports the argument. (Plaintiffs' Motion for Reconsideration, at pp. 3-5) This Court directly addressed this "use before file" argument and properly rejected it, concluding "that the distinction between 'file before use' and 'use before file' schemes does not render *Keogh* inapplicable to the present case." (Slip opinion, at p. 8) Plaintiffs' repetitive effort to argue should be denied.

Plaintiffs also argue – although they never raised these arguments prior to the motion for reconsideration – that this Court is bound by *Brown* and that some or all of the defendants are collaterally estopped by that decision. These purported grounds for reconsideration should be summarily rejected, since motions for reconsideration are not intended to permit a party to make arguments that it previously decided to forego. *See Joplin v. John Hancock Mut. Life Ins. Co.*, 55 Wis. 2d 650, 654-55, 200 N.W.2d 607, 609 (1972) (refusing to consider estoppel claim first raised

on appeal); *see also First National Bank of Appleton v. Nennig*, 92 Wis. 2d 518, 540-41, 285 N.W.2d 614, 625 (1979) (refusing to consider claim first raised on appeal).

Perhaps plaintiffs did not raise these issues before now because *Brown* involved claims under federal (and not Wisconsin) antitrust law and the plaintiffs here had selected a strategy of attempting to distinguish Wisconsin antitrust law from federal antitrust law. In urging this Court not to follow the United States Supreme Court's decisions in *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922), and in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986), plaintiffs included a reply brief heading stating "**In Deciding the *Keogh* Question Here, This Court is Not Compelled To Follow Federal Precedent.**" (Reply Brief of the Plaintiffs-Appellants to the Responsive Brief of the Non-MDL Defendants-Respondents, at p. 4) (boldface in original). At that time, plaintiffs accused the defendants of making "the obviously erroneous argument that this Court is *forced* to adopt *Keogh* because it is compelled to follow federal antitrust law precedents." (*Id.*) (emphasis in original). The plaintiffs asked rhetorically, "How could an issue so specific to Wisconsin law possibly be 'controlled' by the *federal* courts' interpretation of the Sherman Act?" (*Id.* at 5) (emphasis in original).

Plaintiffs have consistently responded to the filed rate doctrine with their theory that even if federal antitrust law recognizes the doctrine as a defense to a claim for antitrust damages, Wisconsin law would not. Now that this Court has traced the history of the filed rate doctrine in Wisconsin law and held that it does apply to bar antitrust damages (Slip Op., at pp. 6-8), plaintiffs

abandon their prior tactical decision to distinguish federal law and they argue that the *Brown* federal law precedent is "controlling and binding" on this Court.[1]

Moreover, plaintiffs' new found arguments are meritless for a number of reasons. These reasons include:

1. The *Brown* decision misapplied the *Keogh* doctrine because the Ninth Circuit reasoned that the *Keogh* doctrine could not apply to rates (1) that were allegedly the product of unlawful activity before they were filed or (2) that were not subject to meaningful review. 982 F.2d at 394. The United States Supreme Court rejected both these arguments in *Square D*. As this Court recognized in its decision (slip op. at p. 8 and p. 12), in *Square D*, the United States Supreme Court expressly held that *Keogh* applies even if the defendants are alleged to have conspired to fix rates contrary to the statutory scheme and even if there were no investigation and approval before use. *See Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S.

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[1] Plaintiffs' request for relief is most telling. First, plaintiffs suggest that the Court "may desire further briefing on the issues presented by *Brown* and *Crozier*." (Plaintiffs' Motion for Reconsideration, at p. 6) This suggestion highlights plaintiffs' reliance on new arguments in their motion for reconsideration and their reversal of their prior tactical decisions. Second, plaintiffs suggest that the Court should "exclude title insurance" from the filed rate doctrine, a most unusual suggestion since Chapter 625, Wis. Stat., applies not only to rating bureaus for title insurance but also to rating bureaus for other types of insurance. There is no logical reason for plaintiffs' suggested dichotomy of excluding title insurance rating bureaus but applying the filed rate doctrine to rating bureaus for all other types of insurance.

409, 412-13, 417 n.19 (1986); *see also Minsky v. Auto Driveaway*, 757 F.2d 718, 719-20 (7th Cir.), *cert. denied*, 469 U.S. 1019 (1984) (filed tariff doctrine barred recovery of antitrust damages even though filed rates became effective "without any affirmative action on the part of the ICC"). This Court, to the extent it considered federal precedent, properly followed the reasoning of the United States Supreme Court in *Keogh* and *Square D* rather than the erroneous decision of the Ninth Circuit in *Brown*.

2. This Court is the ultimate interpreter of Wisconsin law, including state insurance law, state antitrust law, and the state filed rate doctrine. *Cf. Professional Office Bldgs., Inc. v. Royal Indem. Co.*, 145 Wis. 2d 573, 580, 427 N.W.2d 427, 429 (Ct. App. 1988) (appellate court follows Wisconsin Supreme Court precedent no matter how persuasive federal decision may be). The Court reaffirmed the application of the filed rate doctrine in the recent case of *GTE North, Inc. v. Public Service Commission*, 500 N.W.2d 284 (Wis. 1993).

3. Collateral estoppel obviously cannot apply to the non-MDL defendants, since they were not parties to the *Brown* case. Contrary to plaintiffs' novel concept of extending the offensive use of collateral estoppel to all whom the plaintiffs allege to be co-conspirators (a concept that plaintiffs urge without any citation to authority – p. 6), the non-MDL parties were not parties to the *Brown* litigation and thus did not have "prior opportunity to adequately litigate" the issues in that case. *See Michelle T. v. Crozier*,

173 Wis. 2d 681, 698, 495 N.W.2d 327, 334 (Wis. 1993).

4. Collateral estoppel does not apply to the MDL defendants for the reasons, among others, that there is no final judgment in the *Brown* litigation and that the application of collateral estoppel to these six defendants would be fundamentally unfair and contrary to public policy. *See Crozier*, 173 Wis. 2d at 689, 495 N.W.2d at 330-31 (courts may consider several factors in weighing claims of collateral estoppel, including public policy and fundamental fairness); *State ex rel. Flowers v. Wisconsin Dep't of Health & Social Servs.*, 81 Wis. 2d 376, 387, 260 N.W.2d 727, 734 (1978) (collateral estoppel requires "valid final judgment").

5. Even if the *Brown* decision were final, the application of collateral estoppel as to the MDL defendants would not be a matter of right but rather a matter of discretion by the Court. *Michelle T*, 173 Wis. 2d at 690. Where the burdens of litigation have already been borne by the parties and the court, and where the plaintiff has made a deliberate tactical choice to delay asserting its collateral estoppel argument, application of offensive collateral estoppel is properly denied. *Southern Pac. Communications Co. v. A T & T*, 567 F. Supp. 326, 330 (D.D.C. 1983), *aff'd*, 740 F.2d 1011, 1019 (D.C. Cir. 1984). Moreover, even the Ninth Circuit recognizes that concern for avoiding inconsistent judicial determinations is not warranted where the prior ruling "is itself inconsistent with some other adjudication of the same issue." *Crawford v.*

Ranger Ins. Co., 653 F.2d 1248, 1252 (9th Cir. 1981).

In sum, plaintiffs endeavor to use the *Brown* decision as a vehicle to reargue an old argument already rejected by this Court and to make meritless new ones. The Court should, therefore, deny the motion for reconsideration.

II. The Court Should Reject Plaintiffs' Attempt to Add New Arguments and to Obtain an Advisory Opinion Based on Wis. Stat. § 133.14.

Plaintiffs' second "ground" for reconsideration presents another new argument, that *Keogh* does not apply to relief sought under Wis. Stat. § 133.14. Despite their 50 page appellate brief, their three reply briefs (totalling 39 pages), their supplemental briefing in this Court, and the opportunity for oral argument, plaintiffs never raised this supposed exception to the filed rate doctrine until their motion for reconsideration.[2] In fact, plaintiffs magnanimously proclaim that "[a]bsent the filed tariff barrier, [plaintiffs] had been prepared to forego the voiding remedy [of Wis. Stat. § 133.14] and limit their claims for relief to damages based on the actual overcharges." (Plaintiffs' Motion for Reconsideration, at p. 10)

Now that the Court has applied the filed rate doctrine, however, the plaintiffs ask the Court to declare that the filed rate doctrine does not apply to actions pursuant to Wis. Stat. § 133.14. This clearly falls outside the proper

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[2] The Tables of Authorities contained in plaintiffs' briefs indicate that plaintiffs never cited Wis. Stat. § 133.14 in any of their briefs.

scope of a motion for reconsideration, and the Court should summarily deny plaintiffs' motion. *See Wirth v. Ehly*, 93 Wis. 2d 433, 443-44, 287 N.W.2d 140, 145-46 (Wis. 1980) (appellate court will generally not review issue raised for first time on appeal).

The Court also should deny plaintiffs' motion for reconsideration because the new argument is really a request for an advisory opinion as to the rights of other purported plaintiffs. As the Court held in *State ex rel. Deisinger v. Treffert*, 85 Wis. 2d 257, 271, 270 N.W.2d 402, 409 (1978), "[j]udicial restraint dictates not passing on the issue until the facts of the proper case present a justiciable controversy." Here, too, the Court should avoid issuing advisory opinions on issues the Court need not consider to decide the matter.

Even if the Court were to consider the merits of plaintiffs' new arguments, those arguments do not justify reconsideration or a revised mandate.[3] Plaintiffs' fundamental assumption (that a remedy under Wis. Stat. § 133.14 is not rate related) misconstrues the filed rate doctrine. As the Court noted in its opinion, the filed rate doctrine prevents damage claims but does not prohibit

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[3] Defendants do not believe that the Court should reach these issues since plaintiffs never advanced these arguments prior to the motion for reconsideration and, thus, defendants have not had an adequate opportunity to brief and argue these issues. *See Park Bank – West v. Mueller*, 151 Wis. 2d 476, 481, 444 N.W.2d 754, 757 (Ct. App. 1989) (argument waived when not raised or argued in trial court). Should the Court decide to consider these issues despite plaintiffs' waiver, defendants respectfully request the opportunity to brief these issues to set forth defendants' arguments more fully.

private actions seeking injunctive relief or criminal actions brought by the government. (Slip op. at p. 10, n.7) The premise of the filed rate doctrine is that there exists a "legal rate or rates" and that a person is not entitled to any rate other than the applicable legal rate. As the Court held in its opinion, "[i]n order to uphold the regulatory scheme enacted by the Legislature, we conclude that the Insurance Commissioner serves as the plaintiffs' sole source of relief." (Slip op., at p. 10).

Allowing plaintiffs to circumvent the *Keogh* or filed rate doctrine with Wis. Stat. § 133.14 would cause severe disruption of this regulated industry. The insurance commissioner in Wisconsin, as in other states, is charged through the rate approval process and other regulatory mechanisms to assure the viability of insurers so they can respond to the claims of policyholders. Insurers are required to maintain adequate reserves and their sources for these reserves are premiums. If these reserves were suddenly and surprisingly depleted by § 133.14 relief against insurers, the viability of insurers and their regulatory system would be severely threatened. The courts could, by forcing the defendants out of business or into bankruptcy, eliminate the title insurance protection purchased by hundreds of thousands of Wisconsin citizens pursuant to the regulated scheme (and in transactions that plaintiffs do not challenge). It was the Insurance Commissioner's responsibility to approve a fair and adequate rate for the title insurance plaintiffs purchased; this Court should not apply Wis. Stat. § 133.14 to override the regulatory scheme.

Furthermore, plaintiffs' new argument is internally inconsistent. Plaintiffs assert that a complete refund

under Wis. Stat. § 133.14 eliminates the Court's concern that juries could award damages based on rates never filed with the Insurance Commissioner. But plaintiffs admit "the courts will have to fashion an appropriate remedy for those insureds who must or want to retain the benefits of their title insurance contract." (Plaintiffs' Motion for Reconsideration, at p.8) Plaintiffs do not discuss this issue fully, but presumably every homeowner with a mortgage would fall within the group that "must" maintain title insurance as a precondition to the mortgage. "Fashioning a remedy" for such individuals leads directly to the policy of the filed rate doctrine: courts should not engage in post hoc speculation about what rates would have been approved. The filed rate is the legal rate, and the only rate that can be charged in Wisconsin. *Cf. GTE North Inc. v. Public Service Commission*, 500 N.W.2d 284 (Wis. 1993) (unlawful for utility to charge any amount other than the filed rates). Plaintiffs' attempt to circumvent the filed rate doctrine should be denied.

Finally, for the reasons set forth by the defendants in their briefs and at oral argument, the authorization of rating bureaus under Chapter 625 impliedly exempts such conduct from actions under the more general state antitrust laws. *See, e.g.*, Response Brief of Non-MDL Defendants-Respondents, at pp. 28-37. This provides another reason, independent of the *Keogh* doctrine, why plaintiffs' complaint failed to state a claim.

CONCLUSION

For these reasons, the Court should deny plaintiffs-appellants' motion for reconsideration.

Dated this 7th day of July, 1993.

FOLEY & LARDNER

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SEPTEMBER 09, 1993 *

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*The court decided this matter on August 17, 1993.

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THE COURT TODAY ANNOUNCED AN ORDER IN YOUR CASE AS FOLLOWS:

DISTRICT 1
PRENTICE, C. v. TITLE INS CO, 91-1580
PRENTICE, C. v. TITLE INS CO, 91-0402

MOTION FOR RECONSIDERATION DENIED, WITH $50.00 COSTS.

JUSTICES STEINMETZ AND CECI DID NOT PARTICIPATE.

MARILYN L. GRAVES
CLERK OF SUPREME COURT

SUPREME COURT
OF WISCONSIN
P. O. BOX 1688
MADISON, WI 53701-1688

REMITTITUR

CHARLES E. PRENTICE
and JANE G. PRENTICE,
husband & wife
on behalf of themselves and
all others similarly situated,
PLAINTIFFS-APPELLANTS,
V.
TITLE INSURANCE COMPANY
OF MINNESOTA, CHICAGO
TITLE INSURANCE COMPANY,
STEWART TITLE GUARANTY
COMPANY, SECURITY UNION
TITLE INSURANCE COMPANY,
f/k/a SAFECO TITLE
INSURANCE COMPANY,
LAWYERS TITLE INSURANCE
CORPORATION, TICOR TITLE
INSURANCE COMPANY, f/k/a
PIONEER NATIONAL TITLE
INSURANCE, FIRST AMERICAN
TITLE INSURANCE COMPANY
OF THE MID-WEST, f/k/a ST.
PAUL TITLE INSURANCE
CORPORATION, AMERICAN
TITLE INSURANCE COMPANY,
COMMONWEALTH LAND TITLE
INSURANCE COMPANY, TRW
TITLE INSURANCE COMPANY,
f/k/a INSURED TITLE,
INCORPORATED, NATIONAL

APPEAL NO. 91-0402
91-1580
T.Ct. NO. 89-CV-012004

ATTORNEY'S TITLE INSURANCE COMPANY, TITLE USA INSURANCE CORPORATION OF NEW YORK, f/k/a U.S. LIFE TITLE INSURANCE COMPANY OF NEW YORK, ALLAN F. MONTEZAN, as an individual and in his representative capacity on behalf of AM TITLE INS RICHARD F. TYSON, as an individual and in his representative capacity on behalf of AM TITLE INS CHARLES B. SCHIERECK, as an individual and in his representative capacity on behalf of CHI TITLE INS JACK OLIVER, as an individual and in his representative capacity on behalf of, COMMONWEALTH LAND TITLE INSURANCE COMPANY, DUANE H. WUNSCH, as an individual and in his representative capacity on behalf of ASSOCIATE TITLE COUNSEL COMMONWEALTH LAND TITLE, INSURANCE COMPANY, DONALD GRABSKI, as an individual and in his representative capacity on behalf of LAWYERS TITLE INSURANCE CORPORATION, RICHARD STOPCZYNSKI, as an individual and in his representative capacity on behalf of LAWYERS TITLE INSURANCE CORPORATION, PHILIP M. LARKIN, as an individual and in his

representative capacity on behalf of TICOR TITLE INSURANCE COMPANY and HARVEY POLLOCK, as an individual and in his representative capacity on behalf of TITLE INSURANCE COMPANY OF MINNESOTA,
DEFENDANTS-RESPONDENTS

THIS CAUSE WAS AN APPEAL TO REVIEW THE ORDER OF THE CIRCUIT COURT OF MILWAUKEE COUNTY. UPON CONSIDERATION, IT IS ORDERED AND ADJUDGED BY AN OPINION FILED ON JUNE 09, 1993, THAT:

THE JUDGMENT OF THE CIRCUIT COURT IS AFFIRMED.

ROLAND B. DAY Wrote Decision/Opinion
SHIRLEY S. ABRAHAMSON Wrote Dissenting Opinion
DONALD W. STEINMETZ Took No Part
LOUIS J. CECI Took No Part

WITH COSTS TAXED AGAINST:

APPELLANTS IN FAVOR OF TITLE INS, ET AL IN THE AMT OF $178.30; IN FAVOR OF CHICAGO TITLE INS, ET AL IN THE AMT OF $524.40 AND IN FAVOR OF MONTEZON & TYSON IN THE SUM OF $67.20.

THE APPEAL RECORD IS HEREBY RETURNED TO THE CLERK OF CIRCUIT COURT FOR MILWAUKEE COUNTY.

I CERTIFY THAT THE ABOVE IS A CORRECT TRANSCRIPT OF THE ORIGINAL ORDER AND

JUDGMENT OF THE COURT IN THE ABOVE-ENTITLED CAUSE.

DATED:
SEPTEMBER 13, 1993

/s/ MLG

MARILYN L. GRAVES
CLERK, SUPREME COURT

STATE OF WISCONSIN : CIRCUIT COURT : MILWAUKEE COUNTY BRANCH

CHARLES E. PRENTICE and JANE G. PRENTICE, husband & wife, on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

TITLE INSURANCE COMPANY OF MINNESOTA, CHICAGO TITLE INSURANCE COMPANY, STEWART TITLE GUARANTY COMPANY, SECURITY UNION TITLE INSURANCE COMPANY (f/k/a SAFECO TITLE INSURANCE COMPANY), LAWYERS TITLE INSURANCE CORPORATION, TICOR TITLE INSURANCE COMPANY (f/k/a PIONEER NATIONAL TITLE INSURANCE COMPANY), FIRST AMERICAN TITLE INSURANCE COMPANY OF THE MID-WEST)f/k/a ST. PAUL TITLE INSURANCE CORPORATION), AMERICAN TITLE INSURANCE COMPANY, COMMONWEALTH LAND TITLE INSURANCE COMPANY, TRW TITLE INSURANCE COMPANY (f/k/a INSURED TITLE, INCORPORATED) NATIONAL

COMPLAINT
(CLASS ACTION)

(Filed
August 29, 1989)

Case No.:
89CV012004

ATTORNEY'S TITLE INSURANCE COMPANY, TITLE USA INSURANCE CORPORATION OF NEW YORK (f/k/a U.S. LIFE TITLE INSURANCE COMPANY OF NEW YORK), ALLAN F. MONTEZAN, as an individual and in his representative capacity on behalf of AMERICAN TITLE INSURANCE COMPANY, RICHARD F. TYSON, as an individual and in his representative capacity on behalf of AMERICAN TITLE INSURANCE COMPANY, CHARLES B. SCHIERECK, as an individual and in his representative capacity on behalf of CHICAGO TITLE INSURANCE COMPANY, JACK OLIVER, as an individual and in his representative capacity on behalf of COMMONWEALTH LAND TITLE INSURANCE COMPANY, DUANE H. WUNSCH, as an individual and in his representative capacity on behalf of ASSOCIATE TITLE COUNSEL COMMONWEALTH LAND TITLE, INSURANCE COMPANY, DONALD GRABSKI, as an individual and in his representative capacity on behalf of LAWYERS TITLE INSURANCE CORPORATION, RICHARD STOPCZYNSKI, as an individual and in his representative capacity

on behalf of LAWYERS TITLE INSURANCE CORPORATION, PHILIP M. LARKIN, as an individual and in his representative capacity on behalf of TICOA TITLE INSURANCE COMPANY, HARVEY POLLOCK, as an individual and in his representative capacity on behalf of TITLE INSURANCE COMPANY OF MINNESOTA,

Defendants.

COMPLAINT - CLASS ACTION

Plaintiffs, for themselves and as the representatives of the class described below, by their undersigned attorneys, bring this action for treble damages due to the defendants' violations of the antitrust laws, and allege as follows:

I. JURISDICTION AND VENUE

1. This action arises under Sec. 133.18 Wis. Stats. The acts averred constitute an unlawful combination and conspiracy in restraint of trade or commerce within the State of Wisconsin and are in violation of Sec. 133.93 Wis. Stats.

2. Jurisdiction is conferred upon this court by Sec. 891.95 Wis. Stats. and Sec. 133.93 Wis. Stats.

3. Each of the defendants named in this Complaint transacts business, maintains an office, or is found within

the State of Wisconsin, and each of the defendants is within the jurisdiction of this Court for the purpose of service. Many of the unlawful acts done pursuant to the combination and conspiracy hereinafter alleged have been performed within the State of Wisconsin. The intrastate commerce described hereinafter was carried on, in part, within the State of Wisconsin.

Venue is laid in this Circuit pursuant to the provisions of Sec. 801.50 Wis. Stats. The defendants are found, and/or transact or do business in this county, and/or the claims asserted arose in this county.

II. PLAINTIFFS

4. Plaintiffs, Charles E. and Jane G. Prentice, are individuals, who as man and wife, currently reside in Milwaukee County, Wisconsin at 4419 N. Marlborough Drive, Village of Shorewood, WI 53211. During the relevant period of the conspiracy alleged herein, vis. in September, 1984, plaintiffs, Charles E. and Jane G. Prentice were residents of Milwaukee County and purchased title insurance and other settlement services relating to real estate in Milwaukee County, Wisconsin from defendant, the Title Insurance Company of Minnesota, and have therefore been injured by the antitrust violations alleged herein.

III. DEFENDANTS

5. The corporations named below are made defendants herein. Each defendant is incorporated and exists under the laws of the State listed opposite its name, with

its principal place of business at the City listed. During all or part of the period covered by this complaint, each defendant corporation engaged in the business of providing title search services, title insurance, and other settlement services in connection with the purchase and sale of real estate in the State of Wisconsin.

NAME OF CORPORATION	STATE OF INCORPORATION	PRINCIPAL PLACE OF BUSINESS
Title Insurance Company of Minnesota	Minnesota	400 Second Ave., South Minneapolis, MN 55401
Chicago Title Insurance Company	Missouri	1025 Grand Ave. Kansas City, MO 64116
Stewart Title Guaranty Company	Texas	Stewart Building Galveston, TX
Security Union Title Insurance Company	Illinois	300 E. Fifth Ave. Naperville, IL 60540
Lawyers Title Insurance Coporation	Virginia	6630 W. Broad St. Richmond, VA 23230
Ticor Title Insurance Company	California	6300 Wilshire Blvd. Suite 836 Los Angeles, CA 90048
First American Title Insurance Company of the Mid-West	Michigan	1650 W. Big Beaver Rd. Troy, MI 48084

NAME OF CORPORATION	STATE OF INCORPORATION	PRINCIPAL PLACE OF BUSINESS
American Title Insurance Company	Florida	1101 Brickell Ave. Miami, FL 33131
Commonwealth Land Title Insurance Company	Pennsylvania	8 Penn Center Plaza Philadelphia, PA 19103
TRW Title Insurance Company	Kansas	6800 College Blvd. Suite 200 Overland Park, KS 66211
National Attorney's Title Insurance Company	New York	32 Broadway New York, NY 10004
Title USA Insurance Corporation of New York	New York	120 Broadway New York, NY 19271

6. The defendants named below are sued individually, and also in their representative capacity on behalf of the corporate defendants by whom they were employed during part of all the conspiracy alleged herein.

INDIVIDUAL	CURRENT ADDRESS	DEFENDANT CORPORATE EMPLOYER
Allan F. Montezan	3332 Pennsylvania Ave. Milwaukee, WI 53207	American Title Insurance Company
Richard F. Tyson	5204 W. Washington Blvd. Milwaukee, WI 53200	American Title Insurance Company
Charles B. Schiereck	734 N. Fourth St. Milwaukee, WI 53203	Chicago Title Insurance Company
Jack Oliver	2511 N. 124th St. Brookfield, WI 53005	Commonwealth Land Title Insurance Company
Duane H. Wunsch	2511 N. 124th St. Brookfield, WI 53005	Associate Title Counsel, Commonwealth Land Title Insurance Company
Donald Grabski	address unknown but upon information and belief is a resident of the State of Wisconsin	Lawyers Title Insurance Coporation

INDIVIDUAL	CURRENT ADDRESS	DEFENDANT CORPORATE EMPLOYER
Richard Stopczynski	611 North Broadway Milwaukee, WI 53202	Lawyers Title Insurance Corporation
Philip M. Larkin	1460 Carriage Lane Brookfield, WI 53005	Ticor Title Insurance Company
Harvey Pollack	address unknown but upon information and belief is a resident of the State of Wisconsin	Title Insurance Company of Minnesota

7. The acts charged in this Complaint to have been done by each corporate defendant were authorized, ordered or done by its officers, agents, employees, or representatives, while actively engaged in the management of its affairs.

8. The acts charged in this Complaint to have been done by each individual defendant were performed in their individual capacity as a person, as well as in their capacity as an officer, agent, employee, or representative, of the corporate defendants.

IV. CO-CONSPIRATORS

9. Various other persons, firms and corporations not made defendants herein, including, but not limited to, the Wisconsin Title Insurance Rate Service Organization, a title insurance rate bureau, have participated as co-conspirators with the defendants in the offenses charged and the violations alleged herein and have performed acts and made statements in furtherance thereof.

V. ACCRUAL OF THE CAUSE OF ACTION

10. Prior to January 7, 1985, plaintiffs had no knowledge of the aforesaid antitrust violations, or of any facts which might have led to discovery thereof. Plaintiffs could not have discovered the violation at an earlier date by the exercise of due diligence because of the deceptive practices employed by defendants to avoid detection of, and conceal, such violations when making their rate filings for title insurance, title search services, endorsements applicable to the issuance of title insurance, and

other settlement services with the Wisconsin State Insurance Commission.

On January 7, 1985, the Federal Trade Commission instituted a federal antitrust suit for injunctive relief against certain of the defendants herein, alleging their participation in a nation-wide price fixing conspiracy which included the circumstances upon which the allegations of paragraphs 15, 16, 17, and 18 of this Complaint are based. The State of Wisconsin was one of the states in which the Federal Trade Commission alleged said price fixing occurred.

VI. CLASS ACTION ALLEGATIONS

11. Plaintiffs bring this action on behalf of themselves and as a class action under the provisions of Sec. 893.98 Wis. Stats. as representatives of the class defined herein:

(a) The class consists of all persons as defined in Sec. 133.92(3) Wis. Stats. in the State of Wisconsin (excluding defendants, their subsidiaries, agents, and their affiliates) who have during the period 1971 through at least December 31, 1984, but in any event to the termination of the conspiracy alleged which date is not currently known to plaintiffs, purchased directly, or indirectly from one or more of the defendants (including their subsidiaries, agents or affiliates) title search services, title insurance, and/or other settlement services in connection with the purchase or sale of real estate located in the State of Wisconsin.

(b) The members of the class are so numerous as to make joinder of the class impracticable. Plaintiffs are unable at this time to state the precise size of the class, but on information and belief states that it is in excess of 650,000. The size of the class and the identity of its members should be ascertainable from the defendants' own books and records.

(c) Plaintiffs will fairly and adequately protect the interests of the class. The interest of the plaintiffs is coincident with, and not antagonistic to, that of the remainder of the class. In addition, plaintiffs are represented by experienced and able antitrust counsel who have been involved in many antitrust cases in various states and federal courts throughout the United States.

(d) Plaintiffs' claims are typical of those to be assorted by the class. Except as to the amount of damages each member of the class has by itself sustained, all other questions of law and fact are common to the class. The common questions of law and fact consist in part of those alleged in paragraphs 15, 16, 17 and 18 hereof, and include, among others, the central question of the existence and effect upon plaintiffs and the class members of the combination and conspiracy alleged herein.

(e) Because the only non-common issue is the amount of individual damages to each particular class member, common questions of law and fact clearly predominate. Class action treatment is a superior method for the fair and efficient adjudication of the controversy herein described, because it permits a large number of injured persons, the joinder of which is impracticable, to

prosecute their common claim in a single forum simultaneously. The class members are identifiable from information in the hands of the defendants, and the class action provides an efficient method whereby the enforcement of their rights can be fairly managed.

(f) Each of the members of the class, including plaintiffs, have purchased title search services, title insurance, and/or other settlement services directly, or indirectly, from one of the defendants during the period covered by this complaint and have sustained damages as a result of the combination and conspiracy herein alleged.

VII. NATURE OF TRADE AND COMMERCE

12. During all or part of the period of time covered by this Complaint, the defendant corporations were engaged in the business of, among other things, providing title search services, title insurance, and other settlement services to sellers of real estate in the State of Wisconsin. Defendants accounted for a significant portion of the title insurance sold in Wisconsin during the period covered by this Complaint, and provided their title search services and other settlement services in connection with the sale of such title insurance.

13. During the period covered by this Complaint, defendants were themselves engaged directly in intrastate commerce by reason of their operations in the State of Wisconsin. The amount of commerce involved is substantial. On information and belief damages are estimated to be Tens of Millions of Dollars for the period of the conspiracy.

14. The activities of the defendants and co-conspirators, as described herein, are within the flow of intrastate commerce and substantially affect intrastate commerce in Wisconsin.

VIII. VIOLATIONS ALLEGED

15. Beginning at least as early as 1971 and continuing thereafter at least until sometime in 1986, and possibly longer, the exact dates being unknown to plaintiffs, the defendants and co-conspirators were engaged in a continuing combination and conspiracy in unreasonable restraint of the aforesaid intrastate trade and commerce in violation of Sec. 133.63 Wis. Stats.

16. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, to raise, fix, maintain and stabilize the prices and terms and conditions of sale of title search and examination services, title insurance, endorsements applicable to the issuance of title insurance, and other settlement services in connection with real estate transactions in the State of Wisconsin.

17. All of the defendants participated in a title insurance rating bureau, the Wisconsin Title Insurance Rate Service Organization, through which they agreed from time to time upon the prices for title search and examination services, title insurance, endorsements applicable to the issuance of title insurance, and other settlement services to be charged to the customers of the corporate defendants in the State of Wisconsin in violation of the Wisconsin Insurance laws, Sec. 6215.33 Wis.

Stats. This rating bureau was a co-conspirator of the defendants in connection with violations alleged.

18. In formulating and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which they combined and conspired to do.

IX. EFFECT OF THE COMBINATION AND CONSPIRACY

19. The aforesaid combination and conspiracy has had the following effects, among others:

(a) Prices and terms and conditions of sale of title search services, title insurance, and other settlement services sold by the defendants in the State of Wisconsin have been fixed, raised, maintained and stabilized at artificial and non-competitive levels;

(b) Purchasers of title search services, title insurance, and other settlement services in the State of Wisconsin have been deprived of the benefits of free and open competition in the purchase of title search services, endorsements applicable to the issuance of title insurance, title insurance, and other settlement services;

(c) Competition among the defendants in the sale of title search services, endorsements applicable to the issuance of title insurance, title insurance, and other settlement services has been restrained.

X. DAMAGES

20. During and throughout the period of the combination and conspiracy, plaintiffs and members of the class they represent purchased title search services, title insurance, and other settlement services from one or more of the defendants. By reason of the defendants' illegal conduct, plaintiffs and the members of the class they represent were compelled to pay and have paid substantially higher prices for title search services, endorsements applicable to the issuance of title insurance, title insurance, and other settlement services than they would have paid absent defendants' combination and conspiracy.

21. As a result of the defendants illegal combination and conspiracy, plaintiffs and the class they represent have sustained substantial loss and damage in their business and property in an amount which is presently undetermined.

XI. PRAYER FOR RELIEF

WHEREFORE, plaintiffs prays [sic] that:

(a) The Court adjudge and decree that the defendants, and each of them, have engaged in an unlawful combination and conspiracy in violation of Sec. 133.03 Wis. Stats.;

(b) The Court determine, as provided by Sec. 893.03 Wis. Stats., that this action is a proper class action and that the plaintiffs are proper class representatives;

(c) Pursuant to Sec. 133.19 Wis. Stats. plaintiffs and other members of the class recover threefold the damages determined to have been sustained by each of them

respectively, and that joint and several judgment be entered herein against defendants, and each of them, for the amount determined;

(d) Pursuant to Sec. 133.18 Wis. Stats. plaintiffs and members of the class they represent recover costs of the suit, together with reasonable attorneys' fees;

(e) The Court grant such other, further, or different relief as the case may require and the Court may deem just and proper under the circumstances; and in this case.

(f) Plaintiff demands trial by jury of all issues so triable.

Dated this 29th day of August, 1989.

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STATE OF WISCONSIN — CIRCUIT COURT
MILWAUKEE COUNTY

CHARLES E. PRENTICE and
JANE G. PRENTICE,
husband and wife,

Plaintiffs,

vs. — Case No. 89CV012-004

TITLE INSURANCE COMPANY OF
MINNESOTA, et al,

Defendants.

MEMORANDUM DECISION

Defendants, Chicago Title Insurance Company, Stewart Title Guaranty Company, Security Union Title Insurance Company, Lawyers Title Insurance Corporation, Ticor Title Insurance Company, First American Title Insurance Company of the Mid-West, Charles B. Schiereck, Donald Grabski, Richard Stopcznski and Philip M. Larkin, (hereinafter "MDL633", move to dismiss the complaint pursuant to Sec. 802.06(2), Wis. Stats. These defendants agree that the claims against them are barred by res judicata.

Defendants, Title Insurance Company of Minnesota, Commonwealth Land Title Insurance Company, American Title Insurance Company, TRW Title Insurance Company, Title USA Insurance Company of New York, Jack Oliver, Duane Wunsch, Harvey Pallack, Allan F. Montezon and Richard F. Tyson move to dismiss the complaint pursuant to Sec. 802.06 (2) (f), Wis. Stats. These

defendants assert that the doctrines of implied exemption or filed Tariffs precludes any claims.

In the present case, the plaintiffs filed a class action complaint against all twelve title insurers who were members of the Wisconsin Title Insurance Rate Service Organization. This complaint alleges violations of the Wisconsin Insurance and antitrust laws for conspiracy to fix title insurance notes and fees for a number of services in the state.

The MDL-633 defendants assert that the claims against them are barred by res judicata. The MDL-633 defendants was also the respondents in an FTC action, and defendants in a private class action. *In re Real Estate Title and Settlement Services Antitrust Litigation,* 1986-1 Trade Cas. (CCH) 67, 149 (E.D. Pa. 1986), aff'd mem., 815 F. 2d 695 (3rd Cir. 1987). In that case, the plaintiffs alleged an interstate conspiracy to fix title search fees in thirteen states including Wisconsin in violation of federal antitrust law. The Pennsylvania case was settled.

In *De Pratt vs. West Bend Mutual Ins. Co.,* 113 Wis. 2d 306, 310 (1983) the Court held:

> "The doctrine of res judicata states that a final judgment is conclusive in all subsequent actions between the same parties as to all matters which were litigated or which might have been litigated in the former proceedings."

De Pratt at p. 311 states the elements of res judicata:

> "Under the doctrine of res judicata, in order for the first action to bar the current action, there must be an identity of parties and an identity of causes of actions or claims in the two cases."

In the Pennsylvania case the class was defined as follows:

> "All purchasers and insureds who purchased or received title insurance, including search and examination and/or settlement services, from any title insurance underwriter (whether or not a defendant herein) or any agent of such underwriter with respect to real estate located in any of the thirteen Affected States [including Wisconsin] during the period from January 1, 1981 to December 31, 1985 inclusive."

The plaintiffs in the present represent a class consisting of all persons from 1971-1984, purchased directly or indirectly from one or more of the defendants, title search services, title insurance and/or other settlement services in connection with the purchase or sale of real estate in Wisconsin.

This Court finds that the plaintiffs in the present case and the class certified in the Pennsylvania action are the same. The action in the Eastern District court included the present plaintiff in the defined class. Therefore, the first element of res judicata has been satisfied.

The doctrine of res judicata also requires that there be an identity of causes of actions. In the Pennsylvania case the final order dismissed with prejudice, all claims that plaintiffs and members of the class may have as against defendants, their respective parents, subsidiaries, affiliates, agents, officers, directors and employees, arising under the laws of the United States or of any state or other jurisdiction that are based on, relate to or arise out of any allegations that any of them agreed or conspired to fix, raise, maintain, stabilize, or otherwise affect the

prices of title insurance, including title search and examination and/or settlement services, are dismissed with prejudice; and in addition, each of the complaints filed herein is dismissed with prejudice. The present action alleges that the defendants conspired to raise, fix maintain and stabilize the prices and terms and conditions of sale of title search and examination services, title insurance, endorsements applicable to the issuance of title insurance, and other settlement services.

This Court finds that the present complaint specifically sets forth claims that were dismissed with prejudice by the Pennsylvania case. Therefore, this Court finds that claims against the MDL-633 defendants are barred by res judicata and are hereby dismissed.

The remaining defendants, the non MDL-633 defendants, assert that the plaintiffs claims are barred by the implied exemption doctrine or the filed tariff doctrine.

In *Keogh vs. Chicago & N.W.R.R.*, 260 U.S 156 (1922), the United States Supreme Court set forth the filed tariff rule. This doctrine provides, that the filing of a tariff with any regulatory body pursuant to a statutory plan of rate regulation bars a plaintiff from commencing a suit for damages against the regulated party, that would, in effect, give a lower rate than the one specified in the tariff note filed. The Wisconsin Courts have also adopted the filed tariff doctrine in *Chicago & N. W. Transportation Co. vs. Thoreson Food Prod., Inc.*, 71 Wis. 2d 143 (1976). In *G.M.W., Inc. vs. Certified Parts Corp.*, 135 Wis. 2d 503, 508-509 (Ct. App. 1986) the court stated that the filed tariff doctrine was recognized in Wisconsin in the *Chicago*

& N.W. Tr. Co. (supra) and this precedent will not be departed from.

In the case currently before the Court, the plaintiffs allege no conduct by the defendants other than their participation in noting bureau activities and they seek lower rated [sic] for title insurance. The rates which the plaintiffs paid in this case were the rates filed with the Office of the Commissioner of Insurance pursuant to Wisconsin Statute.

Therefore, this Court finds that the filed tariff doctrine bars the plaintiff's claims. This is exactly the situation that the filed tariff doctrine applies. The plaintiffs may not now seek a rate lower than that filed with the Commissioner of Insurance. The Complaint is hereby dismissed.

The prevailing attorney(s) to prepare order(s) consistent with this decision.

Dated at Milwaukee, Wisconsin, this 17th day of October, 1990.

BY THE COURT

/s/ John E. McCormick
John E. McCormick
Circuit Judge

STATE OF WISCONSIN — CIRCUIT COURT
MILWAUKEE COUNTY

CHARLES E. PRENTICE, et al.,

Plaintiffs,

v.

TITLE INSURANCE COMPANY OF MINNESOTA, et al.,

Defendants.

ORDER FOR JUDGMENT

(Filed Jan. 17, 1991)

Case No. 89CV012004

This matter having come before the Court upon the motions to dismiss:

(1) Of the defendants, Chicago Title Insurance Company, Stewart Title Guaranty Company, Security Union Title Insurance Company, Lawyers Title Insurance Corporation, Ticor Title Insurance Company, First American Title Insurance Company of the Midwest, Charles B. Schierck, Donald Grabski, Richard Stopcznski and Philip M. Larkin (hereinafter referred to as the "MDL 633 defendants"), on the basis of the res judicata, implied exemption and filed tariff doctrines and the applicable statute of limitations; and

(2) Of the defendants, Title Insurance Company of Minnesota, Commonwealth Land Title Insurance Company, American Title Insurance Company, TRW Title Insurance Company, Title USA Insurance Company of New York, National Attorney's Title Insurance Company, Jack Oliver, Duane Wunsch and Harvey Pollack (hereinafter referred to as the "non-MDL 633 defendants"), on the

basis of the implied exemption and filed tariff doctrines and the applicable statute of limitations; and

(3) Of the defendants, Richard F. Tyson and Allan F. Montezon (hereinafter also referred to as "non-MDL 633 defendants") on the basis of the implied exemption and filed tariff doctrines;

And the Court having received and reviewed written briefs of counsel and having heard oral arguments of counsel on June 25, 1990, with plaintiffs having appeared by James M. Clabault, Law Offices of James M. Clabault, and Randolph E. House; MDL 633 defendants having appeared by: William J. Mulligan, Mulcahy & Wherry, S.C.; John F. Graybeal, Parker, Poe, Adams & Bernstein; John C. Christie, Jr., Bell, Boyd & Lloyd; David M. Foster, Fulbright & Jaworski; Phillip H. Rudolph, Gibson, Dunn & Crutcher; and Paul J. Laveroni, Cooley, Godward, Castro, Huddleson & Tatum; the non-MDL defendants having appeared by Gilbert W. Church and Michael D. Fischer, Foley & Lardner, and Leonard G. Leverson of Kravit, Lammiman & DeBruin, S.C.; and the Court being fully advised in the premises and having rendered its Memorandum Decision dated October 17, 1990;

NOW, THEREFORE, IT IS HEREBY ORDERED as follows:

1. That the plaintiffs' Complaint against the MDL 633 defendants is dismissed on the basis of the doctrine of res judicata all elements of which have been established by said defendants. Defendants have shown the requisite identity both of parties plaintiff and defendant (or their privies), that the claims or causes of actions pursued by the plaintiffs is identical to the claims or

causes of action that were dismissed with prejudice in the MDL 633 proceeding and that the plaintiffs were accorded due process in all respects in the MDL 633 proceeding.

2. That the plaintiffs' Complaint against all defendants is dismissed on the basis of the filed tariff doctrine since the defendants have established all elements of this defense and since the Complaint seeks only damages.

3. Because of the Court's decision in regard to the res judicata and filed tariff issues, it is not necessary for the Court to reach and decide the implied exemption and statute of limitations defenses also raised by the defendants. The Court reserves further consideration and ruling on such previously pending issues.

4. That the dismissal of plaintiffs' Complaint is on the merits.

5. Judgment shall be entered in favor of each of the defendants and against the plaintiffs.

Dated at Milwaukee, Wisconsin, this the 14th day of January, 1990.

BY THE COURT:

(SEAL)

/s/ John E. McCormick
Hon. John E. McCormick
Circuit Court Judge

(SEAL)

STATE OF WISCONSIN)
(SEAL)) SS.
MILWAUKEE COUNTY)

I, the undersigned, Clerk of the Circuit Court of Milwaukee County, Wisconsin do hereby certify that I have compared this document with the original on file and that the same is a full, true and correct copy of said original and of the whole thereof, as the same remains of record in my office.
IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said court, this JAN 18, 1991
date

/s/ Gary J. Barczak
GARY J. BARCZAK
Clerk of Circuit Court, and
Director of Court Services

No. 93-912

FILED
JAN 10 1994
OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

CHARLES E. PRENTICE AND JANE G. PRENTICE, *et al.*,
Petitioners,
v.
TITLE INSURANCE COMPANY OF MINNESOTA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

BRIEF OF CERTAIN RESPONDENTS IN OPPOSITION

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PARTIES IN THIS PROCEEDING

Pursuant to Rules 29.1 and 24, this brief in opposition to the petition is filed by six of the title insurance companies and four of the individuals who were named as defendants in the Wisconsin state court suit that is the subject of the petition. The filing respondents are the defendants identified as the "MDL-633 defendants" in the judgment of the trial court. Pet. App. 76. The filing respondent title insurance companies are: Chicago Title Insurance Company, Ticor Title Insurance Company, Security Union Title Insurance Company, Lawyers Title Insurance Corporation, Stewart Title Guaranty Company and First American Title Insurance Company of the Midwest. The filing respondent individuals are: Charles B. Schiereck, Philip M. Larkin, Richard Stopcznski and Donald Grabski.

Respondents *Chicago Title Insurance Company, Ticor Title Insurance Company*, and *Security Union Title Insurance Company* are, directly or indirectly, wholly-owned subsidiaries of Chicago Title and Trust Company, which is a wholly-owned subsidiary of Alleghany Corporation, a publicly-owned corporation. No non-wholly-owned subsidiary of these petitioners has publicly traded common stock.

Respondent *Lawyers Title Insurance Corporation* is a wholly-owned subsidiary of Lawyers Title Corporation, a publicly-owned corporation. No non-wholly-owned subsidiary of Lawyers Title Insurance Corporation has publicly traded common stock.

Respondent *First American Title Insurance Company of the Midwest* is a wholly-owned subsidiary of First American Title Insurance Company, which is a wholly-owned subsidiary of First American Financial Corporation, a publicly-owned corporation. No non-wholly-owned subsidiary of First American Financial Corporation has publicly traded common stock.

Respondent *Stewart Title Guaranty Company* is a wholly-owned subsidiary of Stewart Information Services Corporation, the common stock of which is traded on the New York Stock Exchange. Non-wholly-owned subsidiaries of Stewart Title Guaranty Company are listed in the Appendix to this brief.

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Other Authority

Robert L. Stern, Eugene Gressman, Stephen M. Shapiro and Kenneth S. Geller, SUPREME COURT PRACTICE § 4.10 (7th ed. 1993) 6

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-912

CHARLES E. PRENTICE AND JANE G. PRENTICE, *et al.*,
Petitioners,

v.

TITLE INSURANCE COMPANY OF MINNESOTA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin

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BRIEF OF CERTAIN RESPONDENTS IN OPPOSITION

The petition should be denied because it seeks review of a judgment of the Wisconsin Supreme Court on a matter of Wisconsin state antitrust and insurance law. The judgment does not present a federal issue within this Court's jurisdiction under 28 U.S.C. § 1257.

STATEMENT OF THE CASE

The case below was one of several private class action suits which followed from a Federal Trade Commission investigation of the activities of state-licensed title insurance rating bureaus, which filed title insurance rates and charges for review by regulatory authorities in several states.[1] In contrast to other suits seeking injunctive relief

[1] The FTC investigation has led to further proceedings in the federal courts. *FTC v. Ticor Title Ins. Co.*, 112 S.Ct. 2169 (1992),

and damages under the federal antitrust laws,[2] the case below was filed in 1989 in the Circuit Court of Milwaukee County, Wisconsin, on behalf of a purported class of purchasers of title insurance and related services for Wisconsin real estate transactions, seeking damages exclusively under Wisconsin state law. Petition Appendix ("Pet. App.") 52, 54, 66, 68-69. The complaint alleged that the defendant title insurance companies and individual employees had violated Wisconsin antitrust and insurance laws by participating in the Wisconsin title insurance rating bureau, and that the plaintiff class members were entitled to damages. No claims were asserted under federal law and no federal jurisdiction was alleged. Pet. App. 66, 68.

After briefing and argument, the Circuit Court of Milwaukee County dismissed the plaintiffs' claims. Pet. App. 71-79. It held that the damage claims were barred by the filed tariff doctrine, because the plaintiffs in effect sought to obtain lower rates for the regulated insurance and services than were provided by the rates or tariffs on file with the state Commissioner of Insurance. Pet. App. 74-75. The court also held, as to the group of defendants filing the present brief, that the claims were barred by res judicata because of a prior federal class action settlement. Pet. App. 72-73. The trial court did not reach other grounds for dismissal that had been raised by the defendants. Pet. App. 78.

In the judgment that the petitioners would have this Court review, the Wisconsin Supreme Court affirmed the dismissal on grounds of the filed tariff doctrine, without

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reversing 922 F.2d 1122 (3d Cir. 1991); *on remand*, 998 F.2d 1129 (3d Cir. 1993), *petition for certiorari pending* (No. 93-856, filed Nov. 29, 1993).

[2] *In re Real Estate Title and Settlement Services Antitrust Litigation*, 1986-1 Trade Cas. (CCH) ¶ 67,149 (E.D. Pa. 1986), *aff'd without opinion*, 815 F.2d 695 (3d Cir. 1987), *cert. denied*, 485 U.S. 909 (1988); *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. granted*, 114 S.Ct. 56 (1993).

reaching any other issue. Pet. App. 5. The filed tariff doctrine, in the words of the Wisconsin Supreme Court, "prohibits a plaintiff from claiming a lower rate than the one filed by a regulated entity with the appropriate regulatory agency, because the filed rate alone governs the relationship between the parties." *Id.* In applying the doctrine to bar a damage claim asserted under Wisconsin state antitrust and insurance law, the Wisconsin Supreme Court noted that the filed tariff doctrine had been stated in holdings of this Court for nearly a century, including cases in which the doctrine had been invoked to bar federal antitrust damage claims, *id.* at 5-6, and had been applied in holdings of Wisconsin courts since at least 1911 with respect to both federal- and Wisconsin-regulated industries, *id.* at 7. The Wisconsin Supreme Court stated that its decision to apply the filed tariff doctrine to bar the plaintiffs' state antitrust claims was based on "[the Wisconsin Supreme Court's] policy of conforming our antitrust decisions to those of the United States Supreme Court, coupled with [the Wisconsin Supreme Court's] history of consistently applying the filed rate doctrine." Pet. App. 8.

After the Wisconsin Supreme Court rendered its decision affirming the dismissal of the plaintiffs' claims, the plaintiffs filed a motion for reconsideration in which they argued for the first time that the resolution of the filed tariff issue was governed, under the doctrine of offensive collateral estoppel, by the holding of the Ninth Circuit in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), *cert. granted on other grounds*, 114 S.Ct. 56 (1993). In *Brown*, the Ninth Circuit held that federal Sherman Act claims against some of the same defendants arising from the operation of the Wisconsin rating bureau were not barred by the filed tariff doctrine. 982 F.2d at 393-394. The Wisconsin Supreme Court issued an order which denied the motion for reconsideration without comment, Pet. App. 47, and the plaintiffs filed their petition for review in this Court.

REASONS FOR DENYING THE WRIT

This Court has jurisdiction to review the decision of a state supreme court by a writ of certiorari where (1) there is a question of the validity of a treaty or statute of the United States; (2) the validity of a state statute is in question on grounds of conflict with the United States Constitution, treaties or laws; or (3) a title, right, privilege or immunity is claimed under the Constitution, treaties, laws or authority of the United States.[3] Because the Wisconsin Supreme Court's judgment does not present a federal issue within this Court's jurisdiction under 28 U.S.C. § 1257, the petition should be denied.

1. The petition seeks review of a judgment of the Wisconsin Supreme Court on a wholly state law matter—that is, whether Wisconsin's regulation of title insurance rates and charges precludes a remedy in damages for an alleged Wisconsin state law antitrust violation. The judgment does not involve any "title, right, privilege or immunity" under the Constitution, treaties, laws or authority of the United States. Nor does it call into question the validity of any federal statute, or the validity of any state statute on federal constitutional or statutory grounds. Both the statutory basis for the plaintiffs' claims and the regulatory structure giving rise to the dispositive defense arose entirely under Wisconsin state law.

That the Wisconsin Supreme Court disposed of the

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[3] Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a).

plaintiffs' claims by applying the filed tariff doctrine does not present a federal issue establishing jurisdiction in this Court. The petition wrongly characterizes this doctrine as a "federal . . . antitrust damage rule." Pet. at 3. In fact, as the decision below itself makes clear, the filed tariff doctrine is a general legal doctrine of broad application, more than a hundred years old, which has been applied by Wisconsin courts in the context of a broad range of contract and tort claims. *See* Pet. App. 5-8. Indeed, in reaching its decision the Wisconsin Supreme Court specifically adverted to its own "history of consistently applying the filed rate doctrine" in Wisconsin state law contexts. *Id.* at 8. The application, in a wholly state-law context, of this general legal principle concerning the availability of damages in rate-regulated industries does not implicate any federal "title, right, privilege or immunity."

2. No federal issue is raised by the fact that the Wisconsin Supreme Court conformed its application of the filed tariff doctrine to this Court's decisions applying the doctrine to bar federal law antitrust damage claims. *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156 (1922); *Square D Co. v. Niagara Frontier Tariff Bureau*, 476 U.S. 408 (1986). Contrary to the plaintiffs' assertion, Pet. at 2, the Wisconsin Supreme Court did not follow these decisions because it was compelled to do so under the Supremacy Clause of the United States Constitution. Rather, it did so because of a Wisconsin state policy to construe its own state antitrust laws in a fashion consistent with federal decisions under the Sherman Act. Pet. App. 8 (*citing State v. Waste Management of Wisconsin, Inc.*, 81 Wis.2d 555, 569, 261 N.W. 2d 147 (1977), *cert. denied*, 493 U.S. 865 (1978)). As this Court has recognized, it is not a federal law matter but rather a State's prerogative whether to conform its state antitrust laws to federal antitrust decisions. *See California v. ARC America Corp.*, 490 U.S. 93, 102-103

(1989) (federal antitrust laws do not pre-empt state antitrust law; states may make their own determination of the remedies available for state antitrust violations). The Wisconsin Supreme Court's discussion of federal antitrust precedent does not change the fact that the case was brought under Wisconsin law and was resolved by the Wisconsin Supreme Court pursuant to Wisconsin state law and policy.

For the same reason, the differing precedent represented by the decision of the Ninth Circuit in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 393-394 (9th Cir. 1992), *cert. granted on other grounds*, 114 S.Ct. 56 (1993), does not create a federal issue establishing jurisdiction in this Court. The incorrect result reached by the Ninth Circuit, which refused to apply the filed tariff doctrine to federal Sherman Act claims arising from the same context, does not make a federal issue of the Wisconsin Supreme Court's decision applying the doctrine to state law claims.[4]

3. The petitioners expressly disclaim as an independent ground for seeking review the issue of the purported collateral estoppel effect of the *Brown* decision. Pet. at 26 n.22. This issue would in any event be outside this Court's jurisdiction to review, because it was not properly "drawn in question" or "set up or claimed" below as required by 28 U.S.C. 1257. Although the *Brown* decision was discussed as precedent at oral argument before the Wisconsin Supreme Court, the plaintiffs did not raise a collateral estoppel argument until their

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[4] *See generally* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro and Kenneth S. Geller, SUPREME COURT PRACTICE § 4.10 at 181-184 (7th ed. 1993). While a conflict between a federal appellate decision and the decision of a state supreme court in applying a general legal principal may support review of the federal appellate judgment, the "[state court] decision, of course, resting as it does upon adequate nonfederal grounds, is not reviewable by the Supreme Court." *Id.* at 181.

motion for reconsideration (Pet. 26, Pet. App. 18-23), and the issue was not ruled upon by the Wisconsin Supreme Court in denying reconsideration (Pet. App. 47). Unless it is clear that the issue was affirmatively considered and resolved, there is no jurisdiction in this Court to review an issue raised for the first time in a motion for reconsideration of the decision below. *Hanson v. Denckla,* 357 U.S. 235, 243-244 (1958); *Radio Station WOW v. Johnson,* 326 U.S. 120, 128 (1945); *Consolidated Turnpike Co. v. Norfolk & O.V.R. Co.,* 228 U.S. 326, 333-334 (1913).[5]

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[5] The Wisconsin Supreme Court would have been justified in refusing to apply nonmutual offensive collateral estoppel to the *Brown* decision, consistent with the "broad discretion" granted courts to apply that doctrine in light of its purposes and the interests of justice. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 331 (1979). The special role of the Wisconsin Supreme Court as ultimate interpreter of Wisconsin law, the fact that the collateral estoppel issue was not raised until after the parties and the Wisconsin state courts had already fully addressed the filed tariff defense, the inconsistency that would have resulted as between the *Brown* defendants and the others if collateral estoppel were applied, and the *Brown* decision's misapplication of controlling precedent, were among the considerations strongly weighing against application of collateral estoppel by the Wisconsin Supreme Court. *See* Pet. App. 36-39.

CONCLUSION

The petition should be denied because it does not present an issue within this Court's jurisdiction to review under 28 U.S.C. § 1257.

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APPENDIX

SUBSIDIARIES (except wholly owned subsidiaries) OF STEWART TITLE GUARANTY COMPANY

American Surveying of New England
Associated Abstract Agency, Inc.
Baca Landata, Inc.
Backman-Stewart Title Services, Ltd.
Blaine County Title Associates
Cambridge Landata Incorporated
Citizens Title & Trust
Fleetwood Management Corporation
Island Title Corporation
Island Title Exchange, Inc.
Landata, Inc. of Illinois
Landata, Inc. of the Midwest
Nacogdoches Abstract & Title Company
O'Rourke Title Company
Peoples Title Agency, Inc.
Potomac Title & Escrow
Priority Title Company—Houston Division
Priority Title Company—North Texas Division
Shaw-Landata, Inc.
Stewart Approved Title, Inc.
Stewart Escrow & Title Services of Lawton
Stewart-Fidelity Title Company
Stewart Holding Company
Stewart-Princeton Abstract Company
Stewart River City Title, Inc.
Stewart Tax Service
Stewart Title (Glendale)
Stewart Title Agency of Bergen County
Stewart Title Agency of Ohio, Inc.
Stewart Title & Associates (Chesapeake)
Stewart Title & Escrow, Inc.
Stewart Title & Trust of Phoenix, Inc.
Stewart Title & Trust of Tucson
Stewart Title Company of Colorado Springs

Stewart Title Company of Contra Costa
Stewart Title Company of Minnesota
Stewart Title Delaware, Inc.
Stewart Title of Aspen, Inc.
Stewart Title of Boulder County
Stewart Title of Central Nevada
Stewart Title of Clearwater, Inc.
Stewart Title of Eagle County
Stewart Title of Fort Meyers, Inc.
Stewart Title of Fresno County
Stewart Title of Glenwood Springs, Inc.
Stewart Title of Larimer County
Stewart Title of Lubbock, Inc.
Stewart Title of Mobile, Inc.
Stewart Title of Modesto
Stewart Title of Monterey County
Stewart Title of Montgomery County, Inc.
Stewart Title of Nevada
Stewart Title of New Orleans
Stewart Title of North Carolina, Inc.
Stewart Title of Northern California
Stewart Title of Northern Nevada
Stewart Title of Oregon, Inc.
Stewart Title of Pennsylvania, Inc.
Stewart Title of Pensacola, Inc.
Stewart Title of Rhode Island, Inc.
Stewart Title of Rockport, Inc.
Stewart Title of San Patricio County, Inc.
Stewart Title of Santa Barbara (A division of Stewart Title of Fresno County)
Stewart Title of Sarasota
Stewart Title of Tampa
Stewart Title of the Inland Empire
Stewart Title Orange County
STT Investment Corporation
Texarkana Title & Abstract Co., Inc.
Unique Exchange, Inc.

(3)

No. 93-912

Supreme Court, U.S.
FILED
JAN 12 1994
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1993

CHARLES E. PRENTICE and JANE G. PRENTICE, husband and wife, on behalf of themselves and all others similarly situated,

Petitioners,

v.

TITLE INSURANCE COMPANY OF MINNESOTA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Wisconsin Supreme Court

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REASONS FOR GRANTING THE PETITION

The jurisdictional basis of our Petition is 28 U.S.C. § 1257(a). The MDL 633 Respondents in their Opposition Brief, filed on January 10, 1994, have contested this basis while conceding the existence of conflict over the interpretation of *Keogh* and, implicitly, the importance of the substantive issues presented. This Reply explains why this Court has jurisdiction and why any question about such jurisdiction only adds support to the grant of the writ. This case arose under the Wisconsin antitrust laws. But in reaching its decision that the *Keogh* rule barred this action, the Wisconsin court interwove state and federal antitrust law, concluding that federal law " 'controlled' " its decision. Moreover, it failed to identify any independent state ground for its holding. Consequently, this Court has jurisdiction under the standards promulgated in *Michigan v. Long,* 463 U.S. 1032 (1983). Furthermore, the Wisconsin court mistakenly held that federal law controlled its decision and then misinterpreted the federal law it applied. These actions seriously imperil the paradigm of federalism that this Court has crafted in its recent decisions. *E.g., New York v. United States,* 112 S.Ct. 2408 (1992); *Gregory v. Ashcroft,* 111 S.Ct. 2395 (1991). Hence, the full review and reversal in this case will directly contribute to this Court's policy of maintaining the separate spheres of federal and state law.

A. This Court Presumes That a Decision Mixing Federal and State Law Is Decided on Federal Grounds

In *Michigan v. Long, supra,* this Court established standards for review of state court decisions which rested on federal law or interwove federal and state law:

> [W]hen . . . a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so. If a

> state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached.

Id. at 1040-1041. Thus, a "conclusive presumption" arises "in those cases where a . . . court has good reason to question whether there is an independent and adequate state ground for the decision." *Coleman v. Thompson*, 111 S. Ct. 2546, 2555, 2559 (1991).

This standard has greatly facilitated the clarification of the separate spheres of state and federal law while avoiding the vexing and complex problems that this Court had confronted previously. *E.g., Harris v. Reed*, 489 U.S. 255 (1989); *Caldwell v. Mississippi*, 472 U.S. 320 (1985). This Court has been broadly inclusive with respect to review of state court decisions which have confounded federal and state law.[1] Also relevant is the analysis in *Three Affiliated Tribes v. Wold Engineering*, 467 U.S. 138 (1984), in which this Court reviewed the construction of the North Dakota statute regulating the jurisdiction of its own courts, where the source of the interwoven federal question was statutory rather than constitutional and where the error in federal law was indirectly reflected in the state court decision.[2] This Court recognized that state courts may either "construe state law narrowly" or

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[1] *E.g. Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 10 n.5 (1990) (review of a defamation question in which the state court's decision relied in turn on another decision which had "relied heavily on federal decisions interpreting the scope of First Amendment protection accorded defamation defendants. . . . ; *New York v. P.J. Video, Inc.*, 475 U.S. 868, 872 n.4. (1986) (review of a New York decision involving the scope of protection for allegedly pornographic materials based on the intermixing of federal and state law: "We conclude, in the absence of a 'plain statement' to the contrary, that the decision . . . was premised on federal, not state, law.").

[2] North Dakota's Supreme Court has refused to allow the plaintiffs to pursue a breach of contract action against the defendant in state courts based on a state statute which the court construed to refuse jurisdiction over cases involving Indian tribes.

"broadly" depending on the state court's beliefs about related federal law, and added:

> In both categories of cases, this Court has reviewed the federal question on which the state-law determination appears to have been premised. If the state court has proceeded on an incorrect perception of federal law, it has been this Court's practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state-law question free of misapprehensions about the scope of federal law.

Id. at 152. This Court vacated and remanded, noting that it was "far from certain that the [state] court's present interpretation of . . . [the state law] does not rest on a misconception of federal law." *Id.* at 153.

Thus, under our system of federalism, this Court reviews decisions which interweave federal and state law to ensure that the federal law is applicable, and, if so, is correctly applied to avoid distortion of state law. This Court had committed itself to review such decisions, as discussed in Subpart C below, because it is the only forum in which meaningful relief from such errors can be obtained.

B. The Court Has Jurisdiction In This Case

The *Prentice* decision satisfies both elements of the *Michigan v. Long* test: the result "rest[s] primarily on federal law, or [is] . . . interwoven with the federal law . . . " and no independent state law ground "is . . . clear from the face of the opinion. . . . " 463 U.S. at 1040.[3]

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[3] Prior to the decision, petitioners had urged that Wisconsin-law-based standards should govern the application of the filed tariff doctrine to claims under Wisconsin's antitrust law with respect to unlawful price fixing by insurers regulated by state insurance law. Pet. App. 8, 35. Respondents had advocated that federal law controlled; the Wisconsin court accepted the latter view. In this it is not alone. Other courts have concluded that the filed tariff doctrine applies equally to rates promulgated by state and federal agencies. *E.g., Taffet v. Southern Co.*, 967 F.2d 1483, 1494 (11th Cir.), *cert. denied*, 113 S. Ct. 657 (1992); *H.J. Inc. v. Northwestern Bell Tel. Co.*, 954 F.2d 485, 494 (8th Cir.), *cert. denied*, 112 S. Ct. 2306 (1992).

1. The Wisconsin court's premise that federal law controlled state law is evident from even a cursory review of the *Prentice* opinion. It focused on federal decisions as the only sources for the filed tariff doctrine. Moreover, the court explicitly reiterated its prior holding that the construction of Wisconsin antitrust law is " 'controlled by federal decisions. . . . ' " Pet. App. 8.

The Wisconsin court attributed the filed tariff doctrine to this Court and also pointed out that two of the foundation cases – *Texas & Pacific Railway Co. v. Mugg*, 202 U.S. 242 (1906) and *Louisville & Nashville Railroad Co. v. Maxwell*, 237 U.S. 94 (1915) – involved this Court's reversal of state court decisions which had failed to adhere to rates filed with the ICC. The lesson the Wisconsin court drew was that "allowing a *state court* to award damages based on a hypothetical rate lower than the filed rate would undermine the regulatory scheme. . . . " Pet. App. 5 (emphasis added). The court then quoted *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571 (1981) for the proposition that the filed tariff doctrine "has been extended across the spectrum of regulated utilities." Pet. App. 6, quoting 453 U.S. at 577. *Hall* was another case in which this Court reversed a state supreme court for failing to adhere to the filed tariff doctrine.[4] The Wisconsin court's discussion of its own cases, all outside the antitrust field, states that "this court has applied the filed rate doctrine in different contexts since 1911." Pet. App. 7. Significantly, the only Wisconsin case discussed at length, *Chicago N.W. Transp. Co. v. Thoreson Food Prod. Inc.*, 71 Wis. 2d 143, 238 N.W.2d 69 (1976) (Pet. App. 7-8), involved a situation similar to that in *Hall*, *Mugg* and *Maxwell* in which a shipper tried to avoid paying the full tariff rate filed with a federal regulatory agency. Indeed, in *Thoreson*, the Wisconsin court had declared that "state courts faced with such controversies must apply federal law." 71 Wis. 2d at 147, 238

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[4] As with its citations to *Mugg* and *Maxwell*, the Wisconsin's court's reference to *Hall* took no note of the fact that this Court's filed tariff cases controlled the disposition of state law claims because the particular tariff at issue was federal. Moreover, none of these cases involved a *Keogh* antitrust law question.

N.W.2d at 72 (fn omitted).[5] From there, the court proceeded to the antitrust question, stating that there was no antitrust case in which the Wisconsin "court refused to apply the filed tariff doctrine. Additionally, '[w]e have stated many times that the construction of sec 133.01(1) is controlled by federal decisions under the Sherman Act.' " Pet. App. 8. The court concluded that, combined with its interpretation of the filed tariff doctrine, described above, its "policy of conforming our antitrust decisions to those the United States Supreme Court . . . leads us to adopt the reasoning of the United States Supreme Court's decision in *Keogh.*" Pet. App. 8.

Plainly, the *Prentice* decision reached out to federal law as the basis to limit state law and thereby conclude that the petitioners may not seek antitrust damages in this case. As in *Michigan v. Long,* "the most reasonable explanation [is] that the state court decided the case the way it did because it believed that federal law required it to do so." 463 U.S. at 1040. The reliance on federal law goes well beyond "use[] only for the purpose of guidance. . . . " (*id.* at 1041) and justifies the "conclusive presumption" that federal law controlled. *Coleman v. Thompson,* 111 S.Ct. at 2555.

2. The *Prentice* opinion does not "clearly and expressly" indicate an alternative "bona fide, separate, adequate, and independent grounds . . . " for decision. *Michigan v. Long,* 463 U.S. at 1041; *Coleman v. Thompson,* 111 S. Ct. at 2559. Placing its sweeping filed tariff rule on state grounds alone would have raised some very difficult issues for the court. Neither the legislative history of Wisconsin's antitrust law[6] nor its text (Chap. 133, Wis. Stats.) provides any explicit support for a claim that the legislature intended such a limit on antitrust damage claims for unlawful price fixing. In fact, Wisconsin antitrust law provides an alternative measure of

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[5] As in *Milkovich v. Lorain Journal, supra,* it thus appears that any state law basis for the decision was linked to the court's understanding of federal law. Moreover, citation to state court decisions is not dispositive of the plain statement question. *E.g., New York v. P.J. Video, Inc.,* 475 U.S. at 872 n.4.

[6] The law was completely revised in 1980. *See* Committee Comment, Wis. Stat. Ann., Chap. 133 (West 1980).

damages for price fixing conspiracies: refund of the entire purchase price. Sec. 133.14, Wis. Stats. This remedy avoids the conceptual and practical problems identified in *Keogh* because such a refund does not require judicial review of the reasonableness of a particular rate nor the determination of some other, hypothetical competitive rate. As purely state law, therefore, the decision below would stand for the highly questionable and unexamined proposition that the Wisconsin legislature imposed a potentially stricter damage rule on those conspirators to which the *Keogh* doctrine applies than on any other kind of price fixer.[7] Hence, under the *Michigan v. Long* clear statement rule, this Court should conclude that the Wisconsin court's decision did not rest on a purely state law version of the filed tariff doctrine.

The decision also includes some comments about Wisconsin's insurance regulation and the powers of the Insurance Commissioner, Pet. App. 9-12, but any inference that these statements constitute a separate state ground based on some version of an exclusive jurisdiction theory with respect to restraints of trade in the insurance industry is implausible for several reasons. First, such a resolution of this case should not be inferred because the court assumed that the defendants' price fixing in fact violated the state antitrust law and that their victims were entitled to any remedy other than one based on a difference in rates. Pet. App. 11 & n.7. Second, when the Wisconsin legislature wanted to exempt aspects of insurance from state antitrust law, it said so explicitly. *See, e.g.*, sec. 133.04(4) Wis. Stats. (exempting certain price discrimination, if engaged in by insurers, from antitrust law). Thus, the Wisconsin court could not adopt a sweeping exemption from state antitrust law without what is plainly absent from the decision – a detailed consideration of both the insurance and antitrust statutory schemes as well as their legislative histories. Finally, the court's prior decisions had held that state

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[7] In their motion for reconsideration, the petitioners brought this conflict within state law to the attention of the court. Pet. App. 23-25. The court's refusal to reconsider its decision underscores that the court regarded the filed tariff doctrine as being outside the Wisconsin statutory scheme.

antitrust law is fully applicable to conduct occurring within the insurance industry absent a clearly stated and narrowly defined statutory exemption. *Grams v. Boss,* 97 Wis.2d 332, 294 N.W.2d 473 (1980); *Reese v. Associated Hospital Service,* 45 Wis.2d 526, 173 N.W.2d 661 (1970). Hence, to impose a sweeping exemption, the court would have had to reverse its own prior decisions. Nothing in the opinion suggests the court intended to do that.

3. With respect to the collateral estoppel effect of the *Brown* decision, respondents ignore the fact that it was not until the Court below based its decision on federal law that the collateral estoppel issue arose. Respondents simply argue the general rule that this Court has no jurisdiction to review a federal issue raised for the first time in a motion for reconsideration of the decision below that could have been raised earlier. MDL 633 Respondents Brief 6-7. They ignore the relevant exception, i.e., that when, as here, a federal issue is raised for the first time by the unexpected manner in which the court below decides the case, and a timely petition for rehearing raising that issue is denied without opinion, this Court has jurisdiction. *See* Pet. 27 n.23 (citing cases). None of the cases cited by respondents presents any reason to doubt the applicability of this exception here.

C. Considerations of Federalism Justify Review

An important additional policy reason for review in cases raising substantively important issues where this Court's jurisdiction over state court decisions is challenged is the need to ensure that state courts, one way or the other, are accountable for all of their decisions.[8] So long as a state court

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[8] Petitioners set forth the factual and statutory basis for this Court's jurisdiction in their petition, with due regard for the requirements of Rule 14.1(e) and (h). Pet. 2, 6-7. Since jurisdiction is the exception to the rule that the Court does "not normally address any isues other than those fairly comprised within the questions presented. . . . ", *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency,* 440 U.S. 391, 398 (1979), petitioners believe respondents' election to challenge such jurisdiction warrants our addressing in reply the significance of resolving that challenge.

explicitly decides state law cases by applying only state law, then the judges can be held accountable to the state's legislative and, in some states, electoral controls. However, when state courts rely on federal law they disable the usual state political processes and undermine the legitimate checks on their discretion. In such contexts, only this Court can restore the state courts' accountability. This Court has consistently demonstrated its concern for the separate and independent functioning of state and federal law.[9] *See* Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power,* 100 Harv. L. Rev. 1485, 1509-1510 (1987); Ann Althouse, *Variations on a Theory of Normative Federalism: A Supreme Court Dialogue,* 42 Duke L. J. 979 (1993).

This Court has recently addressed closely related aspects of the substantive federal-state relationship. In *Gregory v. Ashcroft, supra,* the Court observed:

> This federalist structure of joint sovereigns preserves to the people numerous advantages. It assures a decentralized government that will be more sensitive to the diverse needs of a heterogeneous society; it increases opportunity for citizen involvement in democratic processes; it allows for more innovation and experimentation in government and it makes government more responsive by putting the States in competition for a mobile citizenry.

111 S. Ct. at 2399; *see also New York v. United States,* 112 S. Ct. at 2431 ("the Constitution divides authority between

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[9] *E.g., California v. ARC America Corp.,* 490 U.S. 93 (1989) (indirect purchasers may obtain damages under state antitrust law, asserted as a pendent claim in a federal case, even though such damages are not available under federal law); *CTS Corp. v. Dynamics Corp. of America,* 481 U.S. 69 (1987) (state corporate law can impose special voting requirements in cases of corporate takeovers despite general authorization for and regulation of takeovers in federal law); *Wisconsin Public Intervenor v. Mortier,* 111 S.Ct. 2476, 2481 (1991) (trial court held that both state and federal law pre-empted local government imposition of additional regulations on use of pesticides; Wisconsin supreme court affirmed on the basis of federal law alone; this Court reversed only as to the interpretation of federal law).

federal and state governments for the protection of individuals . . . "). This federalism is imperiled if state courts unduly and inappropriately impose federal law to confine the power of the state's legislature and people. In *Gregory,* this Court used the clear statement standard of *Michigan v. Long* to limit the scope of federal legislation that would otherwise severely restrict an area (age limits on state judges) of primary concern to the states. Similarly in *New York v. United States,* this Court refused to countenance a coercive federal regulatory scheme whose objective was to compel the states to regulate a politically difficult subject area (nuclear waste) even though the states had agreed to be bound by the legislation. Such actions, as the Court pointed out, might well be rational self-interested conduct for both state and federal officials, but they created a serious problem of political responsibility. In effect, these officials sought to avoid direct accountability for their policies. Allowing the state court to avoid federal review in this case would introduce a similar dysfunction. By designating federal law as the basis of its decision, the state court has disabled the state's political process. Core federalism values depend on this Court's exercise of review to remove the false impression of federal restraint and to reinstate a properly functioning system of state and federal law.

The Wisconsin court's opinion invokes federal compulsion to deny a state law right in a way that this Court has repeatedly refused to accept. As the Petition in this case shows, the position of the Wisconsin court on the merits of the filed tariff doctrine involves a novel and extreme expansion of that limited and anachronistic doctrine. Had such a decision been based explicitly on state law grounds, the court would have been forced directly to reconcile its holding with its own prior decisions as well as the legislative scheme for imposing alternative remedies on unlawful price fixing. Such a decision would be subject to legislative review. By resting its result on purportedly controlling federal law, the Wisconsin court has denied to the legislature any opportunity to reverse this result as well as fashioned a kind of deniability for themselves when they next face the electorate.

Just as this Court has jurisdiction to review other conflicts within the federalist system, so to it has jurisdiction to review the holding in this case that federal law controls the scope of Wisconsin antitrust law remedies. Moreover, as in *Wold Engineering, supra,* once such jurisdiction exists, it is essential that this Court provide a comprehensive review of the merits of the federal law interpretation adopted by the state even as it explains to the state court that federal law does not in fact control its decision. After all, the error of the Wisconsin court in its decision is two-fold. First, it erroneously held that federal law controlled its decision.[10] Second, it erred as to the scope of the filed tariff doctrine in antitrust cases. These errors are manifestly interconnected, and it would not suffice to remand this case without full review of the court's interpretation of the substantive filed tariff doctrine.

Accordingly, the Court should grant the writ of *certiorari.*

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[10] Petitioners recognize that this question is not entirely free from doubt in light of *Taffet, supra,* and *H.J. Inc., supra,* as well as the potential that due process considerations might, under some circumstances, limit the power of states to impose damage remedies with respect to regulated rates.

No. 93-912

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In The

Supreme Court of the United States

October Term, 1993

CHARLES E. PRENTICE AND JANE G. PRENTICE, et al.,

Petitioners,

v.

TITLE INSURANCE COMPANY OF MINNESOTA, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Wisconsin

BRIEF IN OPPOSITION ON BEHALF OF TITLE INSURANCE COMPANY OF MINNESOTA, COMMONWEALTH LAND TITLE INSURANCE COMPANY, AMERICAN TITLE INSURANCE COMPANY, TRW TITLE INSURANCE COMPANY, TITLE USA INSURANCE COMPANY OF NEW YORK, NATIONAL ATTORNEYS' TITLE INSURANCE COMPANY, JACK OLIVER, DUANE WUNSCH AND HARVEY POLLACK

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QUESTION PRESENTED

Whether this Court has jurisdiction to review the Wisconsin Supreme Court's interpretation of that state's antitrust law in a lawsuit involving no federal claims or questions.

PARTIES IN THIS PROCEEDING AND RULE 29.1 LIST

The respondents filing this brief are Title Insurance Company of Minnesota, Commonwealth Land Title Insurance Company, American Title Insurance Company, TRW Title Insurance Company, Title USA Insurance Company of New York, National Attorneys' Title Insurance Company, Jack Oliver, Duane Wunsch and Harvey Pollack. The other parties to this litigation are listed in the caption of the Wisconsin Supreme Court decision, Pet. App., pp. 1-2.

Respondent Title Insurance Company of Minnesota is now known as Old Republic National Title Insurance Company and is, directly or indirectly, a subsidiary of Old Republic Title Insurance Group, Inc. and Old Republic International Corporation. Old Republic National Title Insurance Company has no subsidiary with publicly traded stock.

Commonwealth Land Title Insurance Company is a subsidiary of State Title Insurance Company, which is a subsidiary of Reliance Insurance Company, which is a subsidiary of Reliance Group Holdings, Inc., which is a corporation whose stock is publicly traded. No subsidiary of these corporations has publicly traded stock.

American Title Insurance Company is a subsidiary of Fidelity National Insurance Company of Pennsylvania, which is a subsidiary of Fidelity National Financial, Inc. No subsidiary of this respondent has publicly traded stock.

PARTIES IN THIS PROCEEDING AND RULE 29.1 LIST – Continued

TRW Title Insurance Company, Title USA Insurance Company of New York (now known as TRW Title Insurance of New York) and National Attorneys' Title Insurance Company (now known as New York TRW Title Insurance Company) were owned by TRW, Inc., which is a publicly traded company. As of January 10, 1994, each of these respondent corporations was acquired by UTC Financial Corporation, which is not a publicly traded company. None of the respondent corporations has a publicly traded subsidiary.

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No. 93-912

In The

Supreme Court of the United States

October Term, 1993

CHARLES E. PRENTICE AND JANE G. PRENTICE, et al.,

Petitioners,

v.

TITLE INSURANCE COMPANY OF MINNESOTA, et al.,

Respondents.

On Petition For A Writ Of Certiorari
To The Supreme Court Of Wisconsin

BRIEF IN OPPOSITION ON BEHALF OF TITLE INSURANCE COMPANY OF MINNESOTA, COMMONWEALTH LAND TITLE INSURANCE COMPANY, AMERICAN TITLE INSURANCE COMPANY, TRW TITLE INSURANCE COMPANY, TITLE USA INSURANCE COMPANY OF NEW YORK, NATIONAL ATTORNEYS' TITLE INSURANCE COMPANY, JACK OLIVER, DUANE WUNSCH AND HARVEY POLLACK

JURISDICTION

The petition should be denied because it seeks review of a judgment of the Wisconsin Supreme Court on a matter of state law. This case does not present a federal question within this Court's jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS

Although petitioners assert that the Supremacy Clause of the United States Constitution is implicated, their claims arise under and relate exclusively to state law. There is no issue involving the application of the Supremacy Clause.

STATEMENT OF THE CASE

The petitioners filed this action in Milwaukee County Circuit Court in August, 1989, alleging that the respondents had violated Wisconsin antitrust law, Wis. Stat. § 133.03. Pet. App. at 52-70 (complaint). Their complaint alleges that respondents' participation in a state authorized insurance rating bureau constituted unlawful price fixing. Nothing in the complaint alleges a claim under federal antitrust law or any other federal law.

On October 17, 1990, Judge John E. McCormick of the Milwaukee County Circuit Court issued a memorandum decision dismissing petitioners' complaint. Pet. App. at 71-75. As to the group of respondents known as the MDL Defendants, the circuit court dismissed the complaint on res judicata grounds based on the settlement of multi-district class action litigation in which they were defendants.[1] Judge McCormick dismissed the complaint as to

[1] The respondents submitting this brief in opposition to the petition were not parties to the multi-district litigation and did not move for dismissal on res judicata grounds. The non-MDL defendants, as these respondents were called, moved to dismiss on the grounds of implied exemption and the filed rate doctrine.

all respondents based on the filed rate doctrine. Pet. App. at 74-75.

Petitioners appealed the dismissal of their complaint to the Wisconsin Court of Appeals, which certified the case to the Wisconsin Supreme Court. The Wisconsin Supreme Court affirmed the dismissal, addressing only the application of the filed rate doctrine. Pet. App. at 1-13; *Prentice v. Title Insurance Company of Minnesota*, 176 Wis. 2d 714, 500 N.W.2d 658 (1993). Petitioners moved for reconsideration, and the Wisconsin Supreme Court denied that motion. Pet. App. at 45-47. Petitioners now seek a writ of certiorari from this Court.

REASONS FOR DENYING THE PETITION

1. This Court Lacks Jurisdiction To Entertain This Petition Under 28 U.S.C. § 1257 Because The Wisconsin Supreme Court's Judgment Is Based Solely on State Law.

This Court should deny certiorari because the decision below represents the Wisconsin Supreme Court's application of state law and does not raise a federal question appropriate for review by this Court. *Agins v. City of Tiburon*, 447 U.S. 255, 260 n.6 (1980).

The petitioners assert no basis for this Court's jurisdiction to grant the writ beyond the conclusory statement that "[t]his Court has jurisdiction to review the judgment of the Wisconsin Supreme Court under 28 U.S.C. § 1257(a)." Pet. Brief at p. 2. Section 1257(a), however,

limits this Court's jurisdiction to review state court judgments to those involving the adjudication of federal questions:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The prohibition against reviewing decisions not involving federal questions is based on longstanding principles of comity and the general rule that this Court may not render advisory opinions. *See Michigan v. Long*, 463 U.S. 1032, 1040 (1983) ("Respect for the independence of state courts, as well as avoidance of rendering advisory opinions, have been the cornerstones of this Court's refusal to decide cases where there is an adequate and independent state ground."); *Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945) ("Our only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights.").

Petitioners do not expressly identify any federal "title, right, privilege or immunity" in question here.[2] It is

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[2] There was no question below of the validity of any treaty or statute of the United States or of the validity of any state statute.

evident that the only possible federal question in this case involves section 1 of the Sherman Act, 15 U.S.C. § 1, and, in particular, the filed rate doctrine announced in *Keogh v. Chicago & Northwest Railway Co.*, 260 U.S. 156 (1922), and most recently affirmed in *Square D Company v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986).

The Wisconsin Supreme Court admittedly adopted the reasoning of *Keogh* in dismissing petitioner's claims pursuant to the filed rate doctrine, but did so as a matter of state, not federal, law. The Wisconsin Supreme Court did not purport to interpret the Sherman Act or to adjudicate any Sherman Act claim, resolving only the state law claims that were before it.

This Court has held that, under certain circumstances, it has jurisdiction to review state supreme court decisions adjudicating state law claims. It has done so, however, only in cases where a state supreme court believed it was compelled by federal law to construe and apply its own law in accordance with federal law. *See e.g., Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 568 (1977) (Court reviewed the Ohio Supreme Court's interpretation of that state's common law right of publicity because it appeared "at the very least the Ohio court felt compelled by what it understood to be federal constitutional considerations to construe and apply its own law in the manner it did"); *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 775 n.3 (1981) (Court reviewed South Dakota Supreme Court's interpretation of state unemployment compensation law that was subject to annual review and certification by the Secretary of Labor). *See also In re Northwestern Lutheran Academy*, 290 N.W.2d 845, 847 (S.D. 1980) (South Dakota Supreme

Court interpretation of state law leading to *St. Martin* decision involved the state's efforts to conform state law to federal directives). Those decisions are inapplicable here.

In reaching its judgment in this case, the Wisconsin Supreme Court looked to this Court's decision in *Keogh v. Chicago and N.W. Railway Co.*, 260 U.S. 156 (1922), for guidance in construing the Wisconsin antitrust provisions. The Wisconsin court said nothing to suggest that it believed itself compelled by federal law to follow *Keogh*. To the contrary, it expressly stated that it looked to federal law merely as a matter of policy:

> This court's *policy* of conforming our antitrust decisions to those of the United States Supreme Court, coupled with this court's history of consistently applying the filed rate doctrine, leads us *to adopt the reasoning* of the United States Supreme Court's decision in *Keogh*.

Pet. App. at 8 (emphasis added).[3] Indeed, the court's decision to "adopt the reasoning" of *Keogh*, rather than simply to "follow" it, demonstrates that the Wisconsin court understood it was free to reject *Keogh*'s reasoning should it decide to do so.

The Wisconsin Supreme Court's analysis of its own application of the filed rate doctrine in other state law

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[3] The Wisconsin Supreme Court's statement that construction of state antitrust laws "is controlled by federal decisions under the Sherman Act," Pet. App. at 8, is an acknowledgement of that policy and cannot be read as a statement that the Wisconsin court was compelled, under the Supremacy Clause, to follow this Court's cases in interpreting state law.

contexts further demonstrates that the court did not believe it was compelled to follow federal antitrust law. The court noted its long history of applying the filed rate doctrine as a matter of state law to bar other claims. Pet. App. at 7. The fact that the Wisconsin Supreme Court also analyzed and agreed with the reasoning of this Court in *Keogh* and *Square D* does not suggest that the Wisconsin Supreme Court felt compelled to follow those decisions. Indeed, had the Wisconsin Supreme Court considered itself compelled to follow *Keogh* and *Square D*, it would have had no reason to review its prior application of the filed rate doctrine to other claims for damages. Pet. App. at 7.

There is nothing in the Wisconsin court's opinion that suggests that it did anything other than what it said it did – look to *Keogh* and *Square D* for guidance in interpreting state antitrust law.[4] This Court has no jurisdiction to review the Wisconsin Supreme Court's interpretation of Wisconsin law simply because the Wisconsin court studied federal law as well as state cases in reaching its decision.

The doctrine of "independent and adequate state grounds" reinforces the conclusion that the petition does

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[4] Both petitioners and respondents noted in briefs to the Wisconsin Supreme Court that the court was not compelled to follow federal law. In their reply brief in the Wisconsin Supreme Court, petitioners argued that the Wisconsin Supreme Court was not compelled to follow *Keogh* and asked rhetorically, "How could an issue so specific to Wisconsin law possibly be 'controlled' by the *federal* courts' interpretation of the Sherman Act?" Pet. App. at 35.

not present a federal question. If the adequacy and independence of a possible state ground is unclear, this Court will presume that the "state court decided the case the way it did because it believed that *federal law required it to do so.*" *Long*, 463 U.S. at 1041 (emphasis added). But when, as here, the state court makes clear in its decision that it chose to use federal cases "only for the purpose of guidance, and [that the federal decisions] do not themselves compel the result that the court has reached," then this Court will not undertake review of the decision.[5] *Id.*

Petitioners' reliance on the Supremacy Clause (Pet. Brief at 2) is simply misplaced. No principle of federal law requires the Wisconsin Supreme Court to interpret the state's antitrust laws in the same way that this Court interprets the Sherman Act. *See California v. ARC America Corp.*, 490 U.S. 93, 101-03 (1989) (federal antitrust laws do not preempt state law). Even if this Court were to grant the writ and determine that the Wisconsin Supreme Court

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[5] *Accord, Michigan v. Long*, 463 U.S. at 1046 n.10 ("an interpretation of state law in our view *compelled* by federal constitutional considerations is not an independent state ground") (emphasis added); *South Dakota v. Neville*, 459 U.S. 553, 558 (1983) (state court "assumed that any violation of the Fifth Amendment privilege also violated, without further analysis, the state privilege"); *Delaware v. Prouse*, 440 U.S. 648, 653 (1979) ("This is one of those cases where 'at the very least, the [state] court felt compelled by what it understood to be federal constitutional considerations to construe . . . its own law in the manner it did.' ") (quoting *Zacchini*, 433 U.S. at 568); *Department of Mental Hygiene v. Kirchner*, 380 U.S. 194, 198 (1965) ("[W]e would have jurisdiction to review only if the federal ground had been the *sole* basis for the decision, or the State Constitution was interpreted under what the state court deemed the compulsion of the Federal Constitution.") (emphasis original).

incorrectly interpreted federal law, the Wisconsin court would remain free on remand to dismiss petitioners' claim again by departing from its normal policy of conforming its antitrust decisions to those of this Court. Thus, any decision this Court might render regarding *Keogh*'s applicability to the facts of the underlying case would be merely advisory, in direct contravention of the often-stated interpretation of section 1257(a).

2. *Brown v. Ticor Title Insurance Co.* is Irrelevant.

Petitioners state that the Wisconsin Supreme Court's refusal to apply res judicata principles to the decision in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992), poses a federal question reviewable by this Court. That is not the case. First, petitioners concede that the existence of the res judicata issue provides no independent basis for granting the writ. Pet. Brief at p. 26, n.22. Second, even where a federal appellate court decision and a state court decision are in direct conflict with respect to "general legal principles or . . . specific state or nonfederal rules," . . . "the [state court] decision, of course, resting as it does upon adequate non-federal grounds, is not reviewable by the Supreme Court." *See* R. Stern, E. Gressman, S. Shapiro and K. Geller, *Supreme Court Practice* § 4.10 at 181-84 (7th Ed. 1993). Third, the *Brown* lawsuit involves claims under federal antitrust law but contains no claims under Wisconsin antitrust law. 982 F.2d at 389-90. This case involves Wisconsin antitrust claims but not federal claims. The Ninth Circuit did not address the state law issue raised in this case.

For the reasons set forth above, the voluntary adoption of federal cases in the interpretation of state law does not present a federal question. There is no jurisdiction, under § 1257(a) or otherwise, to review the Wisconsin Supreme Court's interpretation of state law. The petition should be denied.

3. The Petition Should Not Be Held Pending Resolution of *Brown v. Ticor Title Insurance Co.*, No. 92-1988.

The Prentice petition need not be held pending disposition of this Court's limited grant of certiorari in *Brown v. Ticor Title Ins. Co.*, 114 S. Ct. 56 (1993). Certiorari has been granted in that case only on the question of the res judicata effect of the settlement by the class in *In re Real Estate Title and Settlement Services Antitrust Litigation*, MDL No. 633. As petitioners concede, that issue is different than the res judicata question which petitioners seek to raise here. Pet. Brief at p. 6 n.3. There is no reason to reserve a decision on this petition pending a final decision in the *Brown* case.

CONCLUSION

This Court has no jurisdiction to review a judgment of the Wisconsin Supreme Court in a case involving only state law. Therefore, the Court should dismiss the petition for writ of certiorari.

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No. 93-912

In The

Supreme Court of the United States

October Term, 1993

CHARLES E. PRENTICE and JANE G. PRENTICE, husband and wife, on behalf of themselves and all others similarly situated,

Petitioners,

v.

TITLE INSURANCE COMPANY OF MINNESOTA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Wisconsin Supreme Court

REPLY OF PETITIONERS TO THE NON-MDL RESPONDENTS

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REPLY OF PETITIONERS TO THE NON-MDL RESPONDENTS

The non-MDL respondents, like the MDL 633 respondents, have provided this Court with no assistance "in the exercise of its discretionary jurisdiction" (Rule 15.1) with respect to the merits of this case. Implicitly, they too concede this case presents an important conflict in the application of the rule of *Keogh v. Chicago and N.W. Railway Co.*, 260 U.S. 156 (1922), one whose resolution by this Court would clarify the relationship of modern systems of partial deregulation to antitrust damage claims on behalf of consumers who are victims of unlawful price fixing. They dispute only this Court's jurisdiction to reach these significant questions.

A. The Decision Below Merits Review

Petitioners have set forth several compelling and undisputed reasons why this court should grant the Writ of *Certiorari:*

1. There is a clear conflict between the Wisconsin court's decision and the decision in *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386 (9th Cir. 1992) as to the application of *Keogh* to Wisconsin title insurance.

2. The conflict presents a very important, general question of appropriate standards for applying the *Keogh* rule to various kinds of non-ICC regulatory regimes.[1]

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[1] Heretofore, application of *Keogh* required that there must be a filed rate that the regulatory regime has made the only rate that may legally be charged. Yet in Wisconsin, the system of "use before file" insurance regulation allows, indeed encourages, insurers to change rates freely in response to competitive market forces. Thus, there never is a rate which insurers must charge until they obtain regulatory approval for a change in

3. Wisconsin's failure to provide active regulatory supervision of the insurers' rate setting, as found by this Court in *FTC v. Ticor Title Ins. Co.*, 112 S.Ct. 2169 (1992), presents the additional question of whether *Keogh* should ever bar a damage claim when no regulatory supervision existed. *See Brown* and the dissenting opinion in the lower court in this case. Pet. App. 14-15.

Petitioners also note that even if this Court decides *Brown* in favor of the plaintiffs in that case, the Wisconsin victims of the respondents' unlawful price fixing will not have a full and adequate remedy because of *Brown's* much narrower scope; i.e., the defendants named in *Brown* do not include the six non-MDL respondents here, the conspiracy in *Brown* is of much shorter duration, and it is limited to title insurance services. *See* Pet. 4-5.

B. The Court Has Jurisdiction in This Case

The non-MDL respondents, like the MDL 633 respondents, have claimed that this Court lacks jurisdiction to review this decision because the Wisconsin court followed state, not federal, law. But they cannot point to any "plain statement" to that effect in the court's opinion. Therefore, they try to explain away the Wisconsin court's express holding that the construction of Wisconsin antitrust law "is controlled by federal decisions . . . . " (Pet. App. 8), by reference to that court's use of the phrase "adopt the reasoning" in connection with its discussion of *Keogh*. Brief of Non-MDL Respondents 6. In fact, both of these phrases appear in the same passage of the opinion (Pet. App. 8), and respondents do not attempt to reconcile their combined use. Absent a clear statement from the

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rates. Pet. 16-19; 24-25; Pet. App. 20-21. Moreover, Wisconsin insurance law does not provide for refunds to buyers if rates are excessive. Pet. 19, 23 n.16.

Wisconsin court of an independent and adequate state law ground for its decision, the more plausible conclusion (especially in light of that court's reliance earlier in its opinion on the general federal law of filed tariffs) is that it believed that, since every case is different, a subsequent case is not "controlled" by another unless and until the court concludes that the similarities are such that it must "adopt the reasoning" of the earlier decision for application to the instant case. The totality of the passage, therefore, is consistent with the conclusion that the lower court "decided the case the way it did because it believed that federal law required it to do so." *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

The non-MDL respondents also point to references in the opinion to Wisconsin cases on filed tariffs. Brief of Non-MDL Respondents 7. But they do not address the grounds of those decisions (*See* Reply of Petitioners to the MDL 633 Respondents 4-5, discussing the federal law basis of the most recent of the state cases) and fail to explain why the Wisconsin court drew its definition of the filed tariff doctrine from the decisions of this Court which restricted the application of state law in filed tariff contexts. *Id.*

Respondents also ignore the fact that the lower court went on at considerable length to squarely reject petitioners' arguments that *Keogh* and *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986) do not apply. Pet. App. 8-11, 12-13. Nothing in its discussion of those cases would lead one to believe that the court was, as respondents' claim, merely "look[ing] to *Keogh* and *Square D* for guidance in interpreting state antitrust law." Brief of Non-MDL Respondents 7. Instead, the court found petitioners' damage claims to be barred "[u]nder the filed rate doctrine as enunciated in *Keogh* . . . . " Pet. App. 11.

In *Michigan v. Long*, this Court rejected as unworkable and undesirable its previous, "ad hoc" methods of divining the basis of ambiguous state court decisions which interwove federal and state law in reaching their results. 463 U.S. at 1038-41. The plain statement rule created a clear standard by which this Court would determine its jurisdiction from the clarity of the state grounds expressed within the four corners of the opinion below, not from an independent examination of state law. *Id.* Thus, assuming *arguendo* some ambiguity whether the decision below is grounded in federal law, the labored effort of the non-MDL respondents to argue an independent state grounds is self-defeating. It demonstrates there is "good reason to question whether there is an independent and adequate state ground for the decision;" in such cases, a "conclusive presumption" in favor of this Court's jurisdiction arises. *Coleman v. Thompson*, 111 S.Ct. 2546, 2555, 2559 (1991).

The respondents also deny jurisdiction based on a claim of a purely state law basis on which the case might have been decided. Brief of Non-MDL Respondents 8-9. This argument is inconsistent with the plain statement rule and also with *United Air Lines, Inc. v. Mahin*, 410 U.S. 623 (1973):

> The possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law *does not create an adequate and independent state ground* that relieves this Court of the necessity of considering the federal question.

410 U.S. at 630-31 (emphasis added). This rule avoids the danger of validating a state court decision that might have been decided differently if the lower court were not laboring under an erroneous understanding of federal compulsion. *Id.* Application of the *United Air Lines* rule is particularly appropriate here because, as explained in the

Reply of Petitioners to MDL 633 Respondents 6-7, once the compulsion of *Keogh* and *Square D* are removed, there is no way to harmonize this decision with prior Wisconsin law.

Finally, we reiterate that the Wisconsin court's reliance on a highly expansive interpretation of *Keogh* to insulate a group of law breakers from state-law-based accountability to the victims of their private actions presents an important challenge to this Court's recent efforts to ensure the relative autonomy of state and federal legal regimes. *See* Reply of Petitioners to MDL 633 Respondents 7-10.

CONCLUSION

For the reasons set forth in our Petition, undisputed by either set of Respondents, we urge that the petition be granted.

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